105TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 105–551
2d Session } { Part 2

DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

JULY 22, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 2281]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 2281) to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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49–910

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Digital Millennium Copyright Act of 1998".

SEC. 2. TABLE OF CONTENTS.

TITLE I—WIPO TREATIES IMPLEMENTATION

SEC. 101. SHORT TITLE.

This title may be cited as the "WIPO Copyright Treaties Implementation Act".

SEC. 102. CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS.

(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES.—(1)(A) The Secretary of Commerce shall issue regulations prohibiting any person from circumventing a technological protection measure that effectively controls access to a work protected under title 17, United States Code, to the extent provided in this subsection, effective at the end of the 2-year period beginning on the date of the enactment of this Act.

(B) During the 2-year period described in subparagraph (A), and in each succeeding 2-year period, the Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information, the Commissioner of Patents and Trademarks, and the Register of Copyrights, shall conduct a rulemaking on the record to determine whether users of copyrighted works have been, or are likely to be in the succeeding 2-year period, adversely affected by the implementation of technological protection measures that effectively control access to works protected under title 17, United States Code, in their ability to make lawful uses under title 17, United States Code, of copyrighted works. In conducting such rulemaking, the Secretary shall examine—

(i) the availability for use of copyrighted works;

(ii) the availability for use of works for archival, preservation, and educational purposes;

(iii) the impact of the application of technological protection measures to copyrighted works on criticism, comment, news reporting, teaching, scholarship, or research;

(iv) the effect of circumvention of technological protection measures on the market for or value of copyrighted works; and

(v) such other factors as the Secretary, in consultation with the Assistant Secretary of Commerce for Communications and Information, the Commissioner of Patents and Trademarks, and the Register of Copyrights, considers appropriate.

(C) The Secretary, with respect to each particular class of copyrighted works for which the Secretary has determined, pursuant to the rulemaking conducted under subparagraph (B), that lawful uses have been, or are likely to be, adversely affected, shall waive the applicability of the regulations issued under subparagraph (A) for the ensuing 2-year period. The determinations made in the rulemaking shall not be admissible in any action to enforce any provision of this Act other than this paragraph.

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing a technological protection measure that effectively controls access to a work protected under title 17, United States Code;

(B) has only limited commercially significant purpose or use other than to circumvent a technological protection measure that effectively controls access to a work protected under title 17, United States Code; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological protection measure that effectively controls access to a work protected under title 17, United States Code.

(3) As used in this subsection—

(A) to "circumvent a technological protection measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological protection measure, without the authority of the copyright owner; and

(B) a technological protection measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) ADDITIONAL VIOLATIONS.—(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological protection measure that effectively protects a right of a copyright owner under title 17, United States Code, in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological protection measure that effectively protects a right of a copyright owner under title 17, United States Code, in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological protection measure that effectively protects a right of a copyright owner under title 17, United States Code, in a work or a portion thereof.

(2) As used in this subsection—

(A) to "circumvent protection afforded by a technological protection measure" means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological protection measure; and

(B) a technological protection measure "effectively protects a right of a copyright owner under title 17, United States Code" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under title 17, United States Code.

(c) OTHER RIGHTS, ETC., NOT AFFECTED.—(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under title 17, United States Code.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological protection measure.

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

(d) EXEMPTION FOR NONPROFIT LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS.—(1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under title 17, United States Code, shall not be in violation of the regulations issued under subsection (a)(1)(A). A copy of a work to which access has been gained under this paragraph—

(A) may not be retained longer than necessary to make such good faith determination; and

(B) may not be used for any other purpose.

(2) The exemption made available under paragraph (1) shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.

(3) A nonprofit library, archives, or educational institution that willfully for the purpose of commercial advantage or financial gain violates paragraph (1)—

(A) shall, for the first offense, be subject to the civil remedies under section 104; and

(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under section 104, forfeit the exemption provided under paragraph (1).

(4) This subsection may not be used as a defense to a claim under subsection (a)(2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, component, or part thereof, which circumvents a technological protection measure.

(5) In order for a library or archives to qualify for the exemption under this subsection, the collections of that library or archives shall be—

(A) open to the public; or

(B) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.

(e) LAW ENFORCEMENT AND INTELLIGENCE ACTIVITIES.—This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State.

(f) REVERSE ENGINEERING.—(1) Notwithstanding the regulations issued under subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological protection measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under title 17, United States Code.

(2) Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological protection measure, or to circumvent protection afforded by a technological protection measure, in order to make the identification and analysis permitted under paragraph (1), or for the limited purpose of achieving interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under title 17, United States Code.

(3) The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case may be, provides such information or means solely for the purpose of achieving interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under title 17, United States Code, or violate other applicable law.

(4) For purposes of this subsection, the term "interoperability" means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.

(g) ENCRYPTION RESEARCH.—

(1) DEFINITIONS.—For purposes of this subsection—

(A) the term "encryption research" means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of

knowledge in the field of encryption technology or to assist in the development of encryption products; and

(B) the term "encryption technology" means the scrambling and descrambling of information using mathematical formulas or algorithms.

(2) PERMISSIBLE ACTS OF ENCRYPTION RESEARCH.—Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of the regulations issued under that subsection for a person to circumvent a technological protection measure as applied to a copy, phonorecord, performance, or display of a published work in the course of an act of good faith encryption research if—

(A) the person lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work;

(B) such act is necessary to conduct such encryption research;

(C) the person made a good faith effort to obtain authorization before the circumvention; and

(D) such act does not constitute infringement under title 17, United States Code, or a violation of applicable law other than this section, including section 1030 of title 18, United States Code, and those provisions of title 18, United States Code, amended by the Computer Fraud and Abuse Act of 1986.

(3) FACTORS IN DETERMINING EXEMPTION.—In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include—

(A) whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under title 17, United States Code, or a violation of applicable law other than this section, including a violation of privacy or breach of security;

(B) whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology; and

(C) whether the person provides the copyright owner of the work to which the technological protection measure is applied with notice of the findings and documentation of the research, and the time when such notice is provided.

(4) USE OF TECHNOLOGICAL MEANS FOR RESEARCH ACTIVITIES.—Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to—

(A) develop and employ technological means to circumvent a technological protection measure for the sole purpose of performing the acts of good faith encryption research described in paragraph (2); and

(B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).

(5) REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of this Act, the Assistant Secretary of Commerce for Communications and Information shall report to the Congress on the effect this subsection has had on—

(A) encryption research and the development of encryption technology;

(B) the adequacy and effectiveness of technological protection for copyrighted works; and

(C) protection of copyright owners against the unauthorized access to their encrypted copyrighted works.

The Assistant Secretary shall include in such report recommendations, if any, on proposed amendments to this Act.

(h) COMPONENTS OR PARTS TO PREVENT ACCESS OF MINORS TO THE INTERNET.—In applying subsection (a) and the regulations issued under subsection (a)(1)(A) to a component or part, the court may consider the necessity for its intended and actual incorporation in a technology, product, service, or device, which—

(1) does not itself violate the provisions of title 17, United States Code; and

(2) has the sole purpose to prevent the access of minors to material on the Internet.

(i) PROTECTION OF PERSONALLY IDENTIFYING INFORMATION.—

(1) CIRCUMVENTION PERMITTED.—Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of the regulations issued under that sub-

section for a person to circumvent a technological protection measure that effectively controls access to a work protected under title 17, United States Code, if—

(A) the technological protection measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected;

(B) in the normal course of its operation, the technological protection measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;

(C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and

(D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.

(2) INAPPLICABILITY TO CERTAIN TECHNOLOGICAL PROTECTION MEASURES.—This subsection does not apply to a technological protection measure, or a work it protects, that does not collect or disseminate personally identifying information and that is disclosed to a user as not having or using such capability.

SEC. 103. INTEGRITY OF COPYRIGHT MANAGEMENT INFORMATION.

(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—No person shall, without the authority of the copyright owner or the law—

(1) intentionally remove or alter any copyright management information,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or, with respect to civil remedies under section 104, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under title 17, United States Code.

(c) DEFINITIONS.—As used in this section—

(1) the terms "distribute", "publicly perform", "copies", and "phonorecords" have the meanings given those terms in title 17, United States Code; and

(2) the term "copyright management information" means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

(A) The title and other information identifying the work, including the information set forth on a notice of copyright.

(B) The name of, and other identifying information about, the author of a work.

(C) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.

(D) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

(E) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

(F) Terms and conditions for use of the work.

(G) Identifying numbers or symbols referring to such information or links to such information.

(H) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

(d) LAW ENFORCEMENT AND INTELLIGENCE ACTIVITIES.—This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State.

(e) LIMITATIONS ON LIABILITY.—

(1) ANALOG TRANSMISSIONS.—In the case of an analog transmission, a person who is making transmissions in its capacity as a broadcast station, or as a cable system (as defined in section 602 of the Communications Act of 1934), or someone who provides programming to such station or system, shall not be liable for a violation of subsection (b) if—

(A) avoiding the activity that constitutes such violation is not technically feasible or would create an undue financial hardship on such person; and

(B) such person did not intend, by engaging in such activity, to induce, enable, facilitate, or conceal infringement of a right under title 17, United States Code.

(2) DIGITAL TRANSMISSIONS.—

(A) If a digital transmission standard for the placement of copyright management information for a category of works is set in a voluntary, consensus standard-setting process involving a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to the particular copyright management information addressed by such standard if—

(i) the placement of such information by someone other than such person is not in accordance with such standard; and

(ii) the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under title 17, United States Code.

(B) Until a digital transmission standard has been set pursuant to subparagraph (A) with respect to the placement of copyright management information for a category or works, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to such copyright management information, if the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under title 17, United States Code, and if—

(i) the transmission of such information by such person would result in a perceptible visual or aural degradation of the digital signal; or

(ii) the transmission of such information by such person would conflict with—

(I) an applicable government regulation relating to transmission of information in a digital signal;

(II) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted by a voluntary consensus standards body prior to the effective date of this title; or

(III) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted in a voluntary, consensus standards-setting process open to participation by a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems.

(3) DEFINITIONS.—As used in this subsection—

(A) the term "broadcast station" has the meaning given that term in section 3 of the Communications Act of 1934 (47 U.S.C. 153)); and

(B) the term "cable system" has the meaning given that term in section 602 of the Communications Act of 1934 (47 U.S.C. 522)).

SEC. 104. CIVIL REMEDIES.

(a) CIVIL ACTIONS.—Any person injured by a violation of section 102 or 103, or of any regulation issued under section 102(a)(1), may bring a civil action in an appropriate United States district court for such violation.

(b) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;

(2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;

(3) may award damages under subsection (c);

(4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;

(5) in its discretion may award reasonable attorney's fees to the prevailing party; and

(6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

(c) AWARD OF DAMAGES.—

(1) IN GENERAL.—Except as otherwise provided in this title, a person committing a violation of section 102 or 103, or of any regulation issued under section 102(a)(1), is liable for either—

(A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or

(B) statutory damages, as provided in paragraph (3).

(2) ACTUAL DAMAGES.—The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

(3) STATUTORY DAMAGES.—

(A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 102, or of a regulation issued under section 102(a)(1), in the sum of not less than $200 or more than $2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.

(B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 103 in the sum of not less than $2,500 or more than $25,000.

(4) REPEATED VIOLATIONS.—In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 102 or 103, or any regulation issued under section 102(a)(1), within three years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

(5) INNOCENT VIOLATIONS.—

(A) IN GENERAL.—The court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

(B) NONPROFIT LIBRARY, ARCHIVES, OR EDUCATIONAL INSTITUTIONS.—In the case of a nonprofit library, archives, or educational institution, the court shall remit damages in any case in which the library, archives, or educational institution sustains the burden of proving, and the court finds, that the library, archives, or educational institution was not aware and had no reason to believe that its acts constituted a violation.

SEC. 105. CRIMINAL OFFENSES AND PENALTIES.

(a) IN GENERAL.—Any person who violates section 102 or 103, or any regulation issued under section 102(a)(1), willfully and for purposes of commercial advantage or private financial gain—

(1) shall be fined not more than $500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

(2) shall be fined not more than $1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

(b) LIMITATION FOR NONPROFIT LIBRARY, ARCHIVES, OR EDUCATIONAL INSTITUTION.—Subsection (a) shall not apply to a nonprofit library, archives, or educational institution.

(c) STATUTE OF LIMITATIONS.—No criminal proceeding shall be brought under this section unless such proceeding is commenced within five years after the cause of action arose.

SEC. 106. SAVINGS CLAUSE.

Nothing in this title abrogates, diminishes, or weakens the provisions of, nor provides any defense or element of mitigation in a criminal prosecution or civil action under, any Federal or State law that prevents the violation of the privacy of an individual in connection with the individual's use of the Internet.

SEC. 107. DEVELOPMENT AND IMPLEMENTATION OF TECHNOLOGICAL PROTECTION MEASURES.

(a) STATEMENT OF CONGRESSIONAL POLICY AND OBJECTIVE.—It is the sense of the Congress that technological protection measures play a crucial role in safeguarding the interests of both copyright owners and lawful users of copyrighted works in digital formats, by facilitating lawful uses of such works while protecting the private property interests of holders of rights under title 17, United States Code. Accordingly, the expeditious implementation of such measures, developed by the private sector through voluntary industry-led processes, is a key factor in realizing the full benefits of making available copyrighted works through digital networks, including the benefits set forth in this section.

(b) TECHNOLOGICAL PROTECTION MEASURES.—The technological protection measures referred to in subsection (a) shall include, but not be limited to, those which—

(1) enable nonprofit libraries, for nonprofit purposes, to continue to lend to library users copies or phonorecords that such libraries have lawfully acquired, including the lending of such copies or phonorecords in digital formats in a manner that prevents infringement;

(2) effectively protect against the infringement of exclusive rights under title 17, United States Code, and facilitate the exercise of those exclusive rights; and

(3) promote the development and implementation of diverse methods, mechanisms, and arrangements in the marketplace for making available copyrighted works in digital formats which provide opportunities for individual members of the public to make lawful uses of copyrighted works in digital formats.

(c) PROCEDURES FOR DEVELOPING AND IMPLEMENTING TECHNOLOGICAL PROTECTION MEASURES.—The technological protection measures whose development and implementation the Congress anticipates are those which—

(1) are developed pursuant to a broad consensus in an open, fair, voluntary, and multi-industry process;

(2) are made available on reasonable and nondiscriminatory terms; and

(3) do not impose substantial costs or burdens on copyright owners or on manufacturers of hardware or software used in conjunction with copyrighted works in digital formats.

(d) OVERSIGHT AND REPORTING.—(1) The Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information and the Register of Copyrights, shall review the impact of the enactment of section 102 of this Act on the access of individual users to copyrighted works in digital formats and shall report annually thereon to the Committees on Commerce and on the Judiciary of the House of Representatives and the Committees on Commerce, Science, and Transportation and on the Judiciary of the Senate.

(2) Each report under paragraph (1) shall address the following issues:

(A) The status of the development and implementation of technological protection measures, including measures that advance the objectives of this section, and the effectiveness of technological protection measures in protecting the private property interests of copyright owners under title 17, United States Code.

(B) The degree to which individual lawful users of copyrighted works—

(i) have access to the Internet and digital networks generally;

(ii) are dependent upon such access for their use of copyrighted works;

(iii) have available to them other channels for obtaining and using copyrighted works, other than the Internet and digital networks generally;

(iv) are required to pay copyright owners or intermediaries for each lawful use of copyrighted works in digital formats to which they have access; and

(v) are able to utilize nonprofit libraries to obtain access, through borrowing without payment by the user, to copyrighted works in digital formats.

(C) The degree to which infringement of copyrighted works in digital formats is occurring.

(D) Whether and the extent to which section 102, and the regulations issued under section 102(a)(1), are asserted as a basis for liability in claims brought against persons conducting research and development, including reverse engineering of copyrighted works, and the extent to which such claims constitute a serious impediment to the development and production of competitive goods and services.

(E) The degree to which individual users of copyrighted materials in digital formats are able effectively to protect themselves against the use of technological protection measures to carry out or facilitate the undisclosed collection and dissemination of personally identifying information concerning the access to and use of such materials by such users.

(F) Such other issues as the Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information and the Register of Copyrights, identifies as relevant to the impact of the enactment of section 102 on the access of individual users to copyrighted works in digital formats.

(3) The first report under this subsection shall be submitted not later than one year after the date of the enactment of this Act, and the last such report shall be submitted not later than three years after the date of the enactment of this Act.

(4) The reports under this subsection may include such recommendations for additional legislative action as the Secretary of Commerce and the Register of Copyrights consider advisable in order to further the objectives of this section.

SEC. 108. TECHNICAL AMENDMENTS.

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended—

(1) by striking the definition of "Berne Convention work";

(2) in the definition of "The 'country of origin' of a Berne Convention work"—

(A) by striking "The 'country of origin' of a Berne Convention work, for purposes of section 411, is the United States if" and inserting "For purposes of section 411, a work is a 'United States work' only if";

(B) in paragraph (1)—

(i) in subparagraph (B) by striking "nation or nations adhering to the Berne Convention" and inserting "treaty party or parties";

(ii) in subparagraph (C) by striking "does not adhere to the Berne Convention" and inserting "is not a treaty party"; and

(iii) in subparagraph (D) by striking "does not adhere to the Berne Convention" and inserting "is not a treaty party"; and

(C) in the matter following paragraph (3) by striking "For the purposes of section 411, the 'country of origin' of any other Berne Convention work is not the United States.";

(3) by inserting after the definition of "fixed" the following:

"The 'Geneva Phonograms Convention' is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.";

(4) by inserting after the definition of "including" the following:

"An 'international agreement' is—

"(1) the Universal Copyright Convention;

"(2) the Geneva Phonograms Convention;

"(3) the Berne Convention;

"(4) the WTO Agreement;

"(5) the WIPO Copyright Treaty;

"(6) the WIPO Performances and Phonograms Treaty; and

"(7) any other copyright treaty to which the United States is a party.";

(5) by inserting after the definition of "transmit" the following:

"A 'treaty party' is a country or intergovernmental organization other than the United States that is a party to an international agreement.";

(6) by inserting after the definition of "widow" the following:

"The 'WIPO Copyright Treaty' is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.";

(7) by inserting after the definition of "The 'WIPO Copyright Treaty'" the following:

"The 'WIPO Performances and Phonograms Treaty' is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996."; and

(8) by inserting after the definition of "work made for hire" the following:

"The terms 'WTO Agreement' and 'WTO member country' have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.".

(b) SUBJECT MATTER OF COPYRIGHT; NATIONAL ORIGIN.—Section 104 of title 17, United States Code, is amended—

(1) in subsection (b)—

(A) in paragraph (1) by striking "foreign nation that is a party to a copyright treaty to which the United States is also a party" and inserting "treaty party";

(B) in paragraph (2) by striking "party to the Universal Copyright Convention" and inserting "treaty party";

(C) by redesignating paragraph (5) as paragraph (6);

(D) by redesignating paragraph (3) as paragraph (5) and inserting it after paragraph (4);

(E) by inserting after paragraph (2) the following:

"(3) the work is a sound recording that was first fixed in a treaty party; or";

(F) in paragraph (4) by striking "Berne Convention work" and inserting "pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party"; and

(G) by inserting after paragraph (6), as so redesignated, the following:

"For purposes of paragraph (2), a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be."; and

(2) by adding at the end the following new subsection:

"(d) EFFECT OF PHONOGRAMS TREATIES.—Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.".

(c) COPYRIGHT IN RESTORED WORKS.—Section 104A(h) of title 17, United States Code, is amended—

(1) in paragraph (1), by striking subparagraphs (A) and (B) and inserting the following:

"(A) a nation adhering to the Berne Convention;

"(B) a WTO member country;

"(C) a nation adhering to the WIPO Copyright Treaty;

"(D) a nation adhering to the WIPO Performances and Phonograms Treaty; or

"(E) subject to a Presidential proclamation under subsection (g).";

(2) by amending paragraph (3) to read as follows:

"(3) The term 'eligible country' means a nation, other than the United States, that—

"(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

"(B) on such date of enactment is, or after such date of enactment becomes, a nation adhering to the Berne Convention;

"(C) adheres to the WIPO Copyright Treaty;

"(D) adheres to the WIPO Performances and Phonograms Treaty; or

"(E) after such date of enactment becomes subject to a proclamation under subsection (g).";

(3) in paragraph (6)—

(A) in subparagraph (C)(iii) by striking "and" after the semicolon;

(B) at the end of subparagraph (D) by striking the period and inserting "; and"; and

(C) by adding after subparagraph (D) the following:

"(E) if the source country for the work is an eligible country solely by virtue of its adherence to the WIPO Performances and Phonograms Treaty, is a sound recording.";

(4) in paragraph (8)(B)(i)—

(A) by inserting "of which" before "the majority"; and

(B) by striking "of eligible countries"; and

(5) by striking paragraph (9).

(d) REGISTRATION AND INFRINGEMENT ACTIONS.—Section 411(a) of title 17, United States Code, is amended in the first sentence—

(1) by striking "actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and"; and

(2) by inserting "United States" after "no action for infringement of the copyright in any".

(e) STATUTE OF LIMITATIONS.—Section 507(a) of title 17, United State Code, is amended by striking "No" and inserting "Except as expressly provided otherwise in this title, no".

SEC. 109. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsection (b), the amendments made by this title shall take effect on the date of the enactment of this Act.

(b) AMENDMENTS RELATING TO CERTAIN INTERNATIONAL AGREEMENTS.—(1) The following shall take effect upon the entry into force of the WIPO Copyright Treaty with respect to the United States:

(A) Paragraph (5) of the definition of "international agreement" contained in section 101 of title 17, United States Code, as amended by section 108(a)(4) of this Act.

(B) The amendment made by section 108(a)(6) of this Act.

(C) Subparagraph (C) of section 104A(h)(1) of title 17, United States Code, as amended by section 108(c)(1) of this Act.

(D) Subparagraph (C) of section 104A(h)(3) of title 17, United States Code, as amended by section 108(c)(2) of this Act.

(2) The following shall take effect upon the entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States:

(A) Paragraph (6) of the definition of "international agreement" contained in section 101 of title 17, United States Code, as amended by section 108(a)(4) of this Act.

(B) The amendment made by section 108(a)(7) of this Act.

(C) The amendment made by section 108(b)(2) of this Act.

(D) Subparagraph (D) of section 104A(h)(1) of title 17, United States Code, as amended by section 108(c)(1) of this Act.

(E) Subparagraph (D) of section 104A(h)(3) of title 17, United States Code, as amended by section 108(c)(2) of this Act.

(F) The amendments made by section 108(c)(3) of this Act.

TITLE II—INTERNET COPYRIGHT INFRINGEMENT LIABILITY

SEC. 201. SHORT TITLE.

This title may be cited as the "Internet Copyright Infringement Liability Clarification Act of 1998".

SEC. 202. LIMITATIONS ON LIABILITY FOR INTERNET COPYRIGHT INFRINGEMENT.

(a) IN GENERAL.—Chapter 5 of title 17, United States Code, is amended by adding after section 511 the following new section:

"§ 512. Liability of service providers for online infringement of copyright

"(a) DIGITAL NETWORK COMMUNICATIONS.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or the intermediate and transient storage of such material in the course of such transmitting, routing or providing connections, if—

"(1) it was initiated by or at the direction of a person other than the service provider;

"(2) it is carried out through an automatic technical process without selection of such material by the service provider;

"(3) the service provider does not select the recipients of such material except as an automatic response to the request of another;

"(4) no such copy of such material made by the service provider is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to the anticipated recipients for a longer period than is reasonably necessary for the communication; and

"(5) the material is transmitted without modification to its content.

"(b) SYSTEM CACHING.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the intermediate and temporary storage of material on the system or network controlled or operated by or for the service provider: *Provided,* That—

"(1) such material is made available online by a person other than such service provider,

"(2) such material is transmitted from the person described in paragraph (1) through such system or network to someone other than that person at the direction of such other person,

"(3) the storage is carried out through an automatic technical process for the purpose of making such material available to users of such system or network who subsequently request access to that material from the person described in paragraph (1):

Provided further, That—

"(4) such material is transmitted to such subsequent users without modification to its content from the manner in which the material otherwise was transmitted from the person described in paragraph (1);

"(5) such service provider complies with rules concerning the refreshing, reloading or other updating of such material when specified by the person making that material available online in accordance with an accepted industry standard data communications protocol for the system or network through which that person makes the material available: *Provided further,* That the rules are not used by the person described in paragraph (1) to prevent or unreasonably impair such intermediate storage;

"(6) such service provider does not interfere with the ability of technology associated with such material that returns to the person described in paragraph (1) the information that would have been available to such person if such material had been obtained by such subsequent users directly from such person: *Provided further,* That such technology—

"(A) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

"(B) is consistent with accepted industry standard communications protocols; and

"(C) does not extract information from the provider's system or network other than the information that would have been available to such person if such material had been accessed by such users directly from such person;

"(7) either—

"(A) the person described in paragraph (1) does not currently condition access to such material; or

"(B) if access to such material is so conditioned by such person, by a current individual pre-condition, such as a pre-condition based on payment of a fee, or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have been so authorized and only in accordance with those conditions; and

"(8) if the person described in paragraph (1) makes that material available online without the authorization of the copyright owner, then the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringements described in subsection (c)(3): *Provided further,* That the material has previously been removed from the originating site, and the party giving the notification includes in the notification a statement confirming that such material has been removed or access to it has been disabled or ordered to be removed or have access disabled.

"(c) INFORMATION STORED ON SERVICE PROVIDERS.—

"(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

"(A)(i) does not have actual knowledge that the material or activity is infringing,

"(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, or

"(iii) if upon obtaining such knowledge or awareness, the service provider acts expeditiously to remove or disable access to, the material;

"(B) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and

"(C) in the instance of a notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

"(2) DESIGNATED AGENT.—The limitations on liability established in this subsection apply only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by substantially making the name, address, phone number, electronic mail address of such agent, and other contact information deemed appropriate by the Register of Copyrights, available through its service, including on its website, and by providing such information to the Copyright Office. The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats.

"(3) ELEMENTS OF NOTIFICATION.—

"(A) To be effective under this subsection, a notification of claimed infringement means any written communication provided to the service provider's designated agent that includes substantially the following—

"(i) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;

"(ii) identification of the copyrighted work claimed to have been infringed, or, if multiple such works at a single online site are covered by a single notification, a representative list of such works at that site;

"(iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material;

"(iv) information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available an electronic mail address at which the complaining party may be contacted;

"(v) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, or its agent, or the law; and

"(vi) a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party has the authority to enforce the owner's rights that are claimed to be infringed.

"(B) A notification from the copyright owner or from a person authorized to act on behalf of the copyright owner that fails substantially to conform to the provisions of paragraph (3)(A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent: *Provided,* That the provider promptly attempts to contact the complaining party or takes other reasonable steps to assist in the receipt of notice under paragraph (3)(A) when the notice is provided to the service provider's designated agent and substantially satisfies the provisions of paragraphs (3)(A) (ii), (iii), and (iv).

"(d) INFORMATION LOCATION TOOLS.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the provider referring or linking users to an online location containing infringing material or activity by using information location tools, including a directory, index, reference, pointer or hypertext link, if the provider—

"(1) does not have actual knowledge that the material or activity is infringing or, in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent;

"(2) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and

"(3) responds expeditiously to remove or disable the reference or link upon notification of claimed infringement as described in subsection (c)(3): *Provided,* That for the purposes of this paragraph, the element in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate such reference or link.

"(e) MISREPRESENTATIONS.—Any person who knowingly materially misrepresents under this section—

"(1) that material or activity is infringing, or

"(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee,

or by the service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

"(f) REPLACEMENT OF REMOVED OR DISABLED MATERIAL AND LIMITATION ON OTHER LIABILITY.—

"(1) Subject to paragraph (2) of this subsection, a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

"(2) Paragraph (1) of this subsection shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

"(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

"(B) upon receipt of a counter notice as described in paragraph (3), promptly provides the person who provided the notice under subsection (c)(1)(C) with a copy of the counter notice, and informs such person that it will replace the removed material or cease disabling access to it in ten business days; and

"(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

"(3) To be effective under this subsection, a counter notification means any written communication provided to the service provider's designated agent that includes substantially the following:

"(A) A physical or electronic signature of the subscriber.

"(B) Identification of the material that has been removed or to which access has been disabled and the location at which such material appeared before it was removed or access was disabled.

"(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

"(D) The subscriber's name, address and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notice under subsection (c)(1)(C) or agent of such person.

"(4) A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

"(g) IDENTIFICATION OF DIRECT INFRINGER.—The copyright owner or a person authorized to act on the owner's behalf may request an order for release of identification of an alleged infringer by filing—

"(1) a copy of a notification described in subsection (c)(3)(A), including a proposed order, and

"(2) a sworn declaration that the purpose of the order is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of this title, with the clerk of any United States district court.

The order shall authorize and order the service provider receiving the notification to disclose expeditiously to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged direct infringer of the material described in the notification to the extent such information is available to the service provider. The order shall be expeditiously issued if the accompanying notification satisfies the provisions of subsection (c)(3)(A) and the accompanying declaration is properly executed. Upon receipt of the order, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), a service provider shall expeditiously give to the copyright owner or person authorized by the

copyright owner the information required by the order, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

"(h) CONDITIONS FOR ELIGIBILITY.—

"(1) ACCOMMODATION OF TECHNOLOGY.—The limitations on liability established by this section shall apply only if the service provider—

"(A) has adopted and reasonably implemented, and informs subscribers of the service of, a policy for the termination of subscribers of the service who are repeat infringers; and

"(B) accommodates and does not interfere with standard technical measures as defined in this subsection.

"(2) DEFINITION.—As used in this section, 'standard technical measures' are technical measures, used by copyright owners to identify or protect copyrighted works, that—

"(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

"(B) are available to any person on reasonable and nondiscriminatory terms; and

"(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

"(i) INJUNCTIONS.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies by operation of this section.

"(1) SCOPE OF RELIEF.—

"(A) With respect to conduct other than that which qualifies for the limitation on remedies as set forth in subsection (a), the court may only grant injunctive relief with respect to a service provider in one or more of the following forms—

"(i) an order restraining it from providing access to infringing material or activity residing at a particular online site on the provider's system or network;

"(ii) an order restraining it from providing access to an identified subscriber of the service provider's system or network who is engaging in infringing activity by terminating the specified accounts of such subscriber; or

"(iii) such other injunctive remedies as the court may consider necessary to prevent or restrain infringement of specified copyrighted material at a particular online location: *Provided,* That such remedies are the least burdensome to the service provider that are comparably effective for that purpose.

"(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms—

"(i) an order restraining it from providing access to an identified subscriber of the service provider's system or network who is using the provider's service to engage in infringing activity by terminating the specified accounts of such subscriber; or

"(ii) an order restraining it from providing access, by taking specified reasonable steps to block access, to a specific, identified, foreign online location.

"(2) CONSIDERATIONS.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

"(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

"(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

"(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

"(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

"(3) NOTICE AND EX PARTE ORDERS.—Injunctive relief under this subsection shall not be available without notice to the service provider and an opportunity for such provider to appear, except for orders ensuring the preservation of evi-

dence or other orders having no material adverse effect on the operation of the service provider's communications network.

"(j) DEFINITIONS.—

"(1)(A) As used in subsection (a), the term 'service provider' means an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

"(B) As used in any other subsection of this section, the term 'service provider' means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in the preceding paragraph of this subsection.

"(2) As used in this section, the term 'monetary relief' means damages, costs, attorneys' fees, and any other form of monetary payment.

"(k) OTHER DEFENSES NOT AFFECTED.—The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

"(l) PROTECTION OF PRIVACY.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

"(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity except to the extent consistent with a standard technical measure complying with the provisions of subsection (h); or

"(2) a service provider accessing, removing, or disabling access to material where such conduct is prohibited by law.

"(m) RULE OF CONSTRUCTION.—Subsections (a), (b), (c), and (d) are intended to describe separate and distinct functions for purposes of analysis under this section. Whether a service provider qualifies for the limitation on liability in any one such subsection shall be based solely on the criteria in each such subsection and shall not affect a determination of whether such service provider qualifies for the limitations on liability under any other such subsection.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 17, United States Code, is amended by adding at the end the following:

"512. Liability of service providers for online infringement of copyright.".

SEC. 203. LIMITATIONS ON EXCLUSIVE RIGHTS; COMPUTER PROGRAMS.

Section 117 of title 17, United States Code, is amended—

(1) by striking "Notwithstanding" and inserting the following:

"(a) MAKING OF ADDITIONAL COPY OR ADAPTATION BY OWNER OF COPY.—Notwithstanding";

(2) by striking "Any exact" and inserting the following:

"(b) LEASE, SALE, OR OTHER TRANSFER OF ADDITIONAL COPY OR ADAPTATION.—Any exact"; and

(3) by adding at the end the following:

"(c) MACHINE MAINTENANCE OR REPAIR.—Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if—

"(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

"(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

"(d) DEFINITIONS.—For purposes of this section—

"(1) the 'maintenance' of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

"(2) the 'repair' of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.".

SEC. 204. LIABILITY OF EDUCATIONAL INSTITUTIONS FOR ONLINE INFRINGEMENT OF COPYRIGHT.

(a) RECOMMENDATIONS BY REGISTER OF COPYRIGHTS.—Not later than six months after the date of the enactment of this Act, the Register of Copyrights, after con-

sultation with representatives of copyright owners and nonprofit educational institutions, shall submit to the Congress recommendations regarding the liability of nonprofit educational institutions for copyright infringement committed with the use of computer systems for which such an institution is a service provider, as that term is defined in section 512 of title 17, United States Code (as added by section 202 of this Act), including recommendations for legislation that the Register of Copyrights considers appropriate regarding such liability, if any.

(b) FACTORS.—In formulating recommendations under subsection (a), the Register of Copyrights shall consider, where relevant—

(1) current law regarding the direct, vicarious, and contributory liability of nonprofit educational institutions for infringement by faculty, administrative employees, students, graduate students, and students who are employees of such nonprofit educational institutions;

(2) other users of their computer systems for whom nonprofit educational institutions may be responsible;

(3) the unique nature of the relationship between nonprofit educational institutions and faculty;

(4) what policies nonprofit educational institutions should adopt regarding copyright infringement by users of their computer systems;

(5) what technological measures are available to monitor infringing uses;

(6) what monitoring of their computer systems by nonprofit educational institutions is appropriate;

(7) what due process nonprofit educational institutions should afford in disabling access by users of their computer systems who are alleged to have committed copyright infringement;

(8) what distinctions, if any, should be drawn between computer systems which may be accessed from outside the nonprofit educational systems, those which may not, and combinations thereof;

(9) the tradition of academic freedom; and

(10) such other issues relating to the liability of nonprofit educational institutions for copyright infringement committed with the use of computer systems for which such an institution is a service provider that the Register considers appropriate.

SEC. 205. EVALUATION OF IMPACT OF COPYRIGHT LAW AND AMENDMENTS ON ELECTRONIC COMMERCE AND TECHNOLOGICAL DEVELOPMENT.

(a) FINDINGS.—In order to maintain strong protection for intellectual property and promote the development of electronic commerce and the technologies to support that commerce, the Congress must have accurate and current information on the effects of intellectual property protection on electronic commerce and technology. The emergence of digital technology and the proliferation of copyrighted works in digital media, along with the amendments to copyright law contained in this Act, make it appropriate for the Congress to review these issues to ensure that neither copyright law nor electronic commerce inhibits the development of the other.

(b) EVALUATION BY SECRETARY OF COMMERCE.—The Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information and the Register of Copyrights, shall evaluate—

(1) the effects of this Act and the amendments made by this Act on the development of electronic commerce and associated technology; and

(2) the relationship between existing and emergent technology and existing copyright law.

(c) REPORT TO CONGRESS.—The Secretary of Commerce shall, not later than 1 year after the date of the enactment of this Act, submit to the Congress a report on the evaluation conducted under subsection (b), including any legislative recommendations the Secretary may have.

SEC. 206. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect on the date of the enactment of this Act.

TITLE III—EPHEMERAL RECORDINGS; DISTANCE EDUCATION; EXEMPTION FOR LIBRARIES AND ARCHIVES

SEC. 301. EPHEMERAL RECORDINGS.

Section 112(a) of title 17, United States Code, is amended—

(1) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively;

(2) by inserting "(1)" after "(a)"; and

(3) by inserting after "114(a)," the following: "or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission that broadcasts a performance of a sound recording in a digital format on a nonsubscription basis,"; and

(4) by adding at the end the following:

"(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work described in that paragraph is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord within the meaning of that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of the regulations issued under section 102(a)(1)(A) of the WIPO Copyright Treaties Implementation Act for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.".

SEC. 302. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE EDUCATION.

(a) RECOMMENDATIONS BY NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION.—Not later than 6 months after the date of the enactment of this Act, the Assistant Secretary of Commerce for Communications and Information, after consultation with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, shall submit to the Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works. Such recommendations shall include any legislation the Assistant Secretary considers appropriate to achieve the foregoing objective.

(b) FACTORS.—In formulating recommendations under subsection (a), the Assistant Secretary of Commerce for Communications and Information shall consider—

(1) the need for an exemption from exclusive rights of copyright owners for distance education through digital networks;

(2) the categories of works to be included under any distance education exemption;

(3) the extent of appropriate quantitative limitations on the portions of works that may be used under any distance education exemption;

(4) the parties who should be entitled to the benefits of any distance education exemption;

(5) the parties who should be designated as eligible recipients of distance education materials under any distance education exemption;

(6) whether and what types of technological measures can or should be employed to safeguard against unauthorized access to, and use or retention of, copyrighted materials as a condition to eligibility for any distance education exemption, including, in light of developing technological capabilities, the exemption set out in section 110(2) of title 17, United States Code;

(7) the extent to which the availability of licenses for the use of copyrighted works in distance education through interactive digital networks should be considered in assessing eligibility for any distance education exemption; and

(8) such other issues relating to distance education through interactive digital networks that the Assistant Secretary considers appropriate.

SEC. 303. EXEMPTION FOR LIBRARIES AND ARCHIVES.

Section 108 of title 17, United States Code, is amended—

(1) in subsection (a)—

(A) by striking "Notwithstanding" and inserting "Except as otherwise provided in this title and notwithstanding";

(B) by inserting after "no more than one copy or phonorecord of a work" the following: ", except as provided in subsections (b) and (c)"; and

(C) in paragraph (3) by inserting after "copyright" the following: "that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section";

(2) in subsection (b)—

(A) by striking "a copy or phonorecord" and inserting "three copies or phonorecords";

(B) by striking "in facsimile form"; and

(C) by striking "if the copy or phonorecord reproduced is currently in the collections of the library or archives." and inserting "if—

"(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

"(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives."; and

(3) in subsection (c)—

(A) by striking "a copy or phonorecord" and inserting "three copies or phonorecords";

(B) by striking "in facsimile form";

(C) by inserting "or if the existing format in which the work is stored has become obsolete," after "stolen,"; and

(D) by striking "if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price." and inserting "if—

"(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

"(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format except for use on the premises of the library or archives in lawful possession of such copy."; and

(E) by adding at the end the following:

"For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.".

TITLE IV—RELATED PROVISIONS

SEC. 401. REPORT BY NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION.

Not later than 6 months after the date of the enactment of this Act, the Assistant Secretary of Commerce for Communications and Information shall report to the Congress on appropriate mechanisms to encourage the development of access protocols, encryption testing methods, and security testing methods which would allow lawful access to, with appropriate safeguards to prevent the unlawful copying of, encrypted works. The Assistant Secretary shall include in such report recommendations on proposed amendments to this Act, if any, for achieving such result and for mechanisms to ensure that such safeguards—

(1) would be developed pursuant to a broad consensus of copyright owners and cryptographic researchers and security administrators in an open, fair, voluntary standards-setting process;

(2) to the extent feasible, would protect copyright owners against the unauthorized distribution or reproduction of their encrypted works; and

(3) would not limit encryption research, to the extent such research is permitted by law as of the enactment of this Act.

PURPOSE AND SUMMARY

The purpose of H.R. 2281, the Digital Millennium Copyright Act of 1998, is to implement two international treaties (i.e., the "Copyright Treaty," and the "Performances and Phonograms Treaty") signed by the United States and more than 125 other countries before the World Intellectual Property Organization (WIPO). The Clinton Administration's WIPO Treaties implementing legislation would have amended Title 17 of the United States Code to grant copyright owners a new right against "circumvention" of "technological protection measures," and to establish new provisions dealing with the integrity of "copyright management information." As reported by the Committee on the Judiciary, H.R. 2281 included

two titles: Title I would implement the two WIPO treaties; and Title II would provide for limitations on copyright infringement liability for on-line and other service providers.

Title I of H.R. 2281, as reported by the Committee on Commerce, also would implement the WIPO treaties, but through free-standing provisions of law rather than as amendments to Title 17. Title II, as amended by the Committee on Commerce, includes comprehensive provisions addressing copyright infringement liability for on-line and other service providers. Title III, as added by the Committee on Commerce, would address ephemeral recordings, the use of computer and other networks to foster distance learning, and exemptions for libraries and archives to permit them to use the latest technology to preserve deteriorating manuscripts and other works. With these proposed revisions, the Committee believes it has appropriately balanced the interests of content owners, on-line and other service providers, and information users in a way that will foster the continued development of electronic commerce and the growth of the Internet.

BACKGROUND AND NEED FOR LEGISLATION

LEGISLATIVE HISTORY

Much like the agricultural and industrial revolutions that preceded it, the digital revolution has unleashed a wave of economic prosperity and job growth. Today, the information technology industry is developing versatile and robust products to enhance the lives of individuals throughout the world, and our telecommunications industry is developing new means of distributing information to these consumers in every part of the globe. In this environment, the development of new laws and regulations will have a profound impact on the growth of electronic commerce and the Internet.

In recognition of these developments, and as part of the effort to begin updating national laws for the digital era, delegates from over 150 countries (including the United States) convened in December 1996 to negotiate the Copyright Treaty and the Performances and Phonograms Treaty under the auspices of the World Intellectual Property Organization (WIPO). In July 1997, the Clinton Administration submitted the treaties to the Senate for ratification and submitted proposed implementing legislation to both the House and the Senate.

On May 22, 1998, the Committee on the Judiciary reported H.R. 2281, the "WIPO Copyright Treaties Implementation Act" to the House. H.R. 2281 was sequentially referred to the Committee on Commerce for its consideration, initially for a period not to extend beyond June 19, 1998. Meanwhile, on May 14, 1998, the Senate adopted S. 2037, the "Digital Millennium Copyright Act." The Senate included provisions to explicitly authorize reverse engineering for purposes of achieving interoperability between computer products. The Senate also added a provision to ensure that librarians and archivists could use the latest technology to preserve deteriorating manuscripts and other works. It also added a so-called "no mandate" provision with respect to the design of consumer electronics, telecommunications, and computer products.

On June 5, 1998, the Subcommittee on Telecommunications, Trade, and Consumer Protection held a legislative hearing on H.R. 2281. The Committee had been advised that both H.R. 2281, as reported by the Committee on the Judiciary, and S. 2037, as passed by the Senate, were "compromises" that enjoyed "broad support." But it became apparent at the hearing that both bills faced significant opposition from many private and public sector interests, including libraries, institutions of higher learning, consumer electronics and computer product manufacturers, and others with a vital stake in the growth of electronic commerce and the Internet. In light of the serious concerns raised at the hearing, and in recognition of the complexity of the issues posed by the legislation, Chairman Bliley requested that the Committee's referral be further extended. The Committee's referral was subsequently extended, for a period not to extend beyond July 22, 1998.

PROMOTING ELECTRONIC COMMERCE

The Committee on Commerce is in the midst of a wide-ranging review of all issues relating to electronic commerce, including the issues raised by this legislation. The growth of electronic commerce is having a profound impact on the nation's economy. Over the past decade, the information technology sector of our economy has grown rapidly and is seen by many as playing a leading role in the current economic expansion. According to The Emerging Digital Economy, a recent Department of Commerce report on electronic commerce, the information technology sector now constitutes 8.2 percent of the Nation's gross domestic product, up from 4.5 percent in 1985. At the end of 1997, approximately 7.4 million Americans were employed in this field. It is expected that estimates of the total value of economic activity conducted electronically in 2002 will range from $200 billion to more than $500 billion, compared to just $2.6 billion in 1996.

H.R. 2281 is one of the most important pieces of legislation affecting electronic commerce that the 105th Congress will consider. It establishes a wide range of rules that will govern not only copyright owners in the marketplace for electronic commerce, but also consumers, manufacturers, distributors, libraries, educators, and on-line service providers. H.R. 2281, in other words, is about much more than intellectual property. It defines whether consumers and businesses may engage in certain conduct, or use certain devices, in the course of transacting electronic commerce. Indeed, many of these rules may determine the extent to which electronic commerce realizes its potential.

The Committee on Commerce's role in considering this legislation is therefore critical. The Committee has a long-standing interest in addressing all issues relating to interstate and foreign commerce, including commerce transacted over all electronic mediums, such as the Internet, and regulation of interstate and foreign communications. This legislation implicates each of those interests in numerous ways.

UNDERSTANDING THE NEXUS BETWEEN ELECTRONIC COMMERCE AND INTELLECTUAL PROPERTY

The debate on this legislation highlighted two important priorities: promoting the continued growth and development of electronic commerce; and protecting intellectual property rights. These goals are mutually supportive. A thriving electronic marketplace provides new and powerful ways for the creators of intellectual property to make their works available to legitimate consumers in the digital environment. And a plentiful supply of intellectual property—whether in the form of software, music, movies, literature, or other works—drives the demand for a more flexible and efficient electronic marketplace.

As electronic commerce and the laws governing intellectual property (especially copyright laws) change, the relationship between them may change as well. To ensure that Congress continues to enact policies that promote both of the above goals, it is important to have current information about the effects of these changes. For example, many new technologies for distributing real-time audio and video through the Internet function by storing small parts of copyrighted works in the memory of the recipient's computer. This technology is increasingly commonplace, but some providers of the technology are concerned that the making of these transient copies may subject them or their customers to liability under current copyright law. In another example, an increasing number of intellectual property works are being distributed using a "client-server" model, where the work is effectively "borrowed" by the user (e.g., infrequent users of expensive software purchase a certain number of uses, or viewers watch a movie on a pay-per-view basis). To operate in this environment, content providers will need both the technology to make new uses possible and the legal framework to ensure they can protect their work from piracy.

The Committee on Commerce believes it is important to more precisely define the relationship between intellectual property and electronic commerce, and to understand the practical implications of this relationship on the development of technology to be used in promoting electronic commerce. To that end, the Committee adopted an amendment that directs the Secretary of Commerce (the Secretary) to report on the effects of this legislation on the development of electronic commerce and the relationship between technology and copyright law. In the course of preparing the report, the Secretary is directed to consult with both the Assistant Secretary of Commerce for Communications and Information (given the Assistant Secretary's expertise in the area of telecommunications and information services and technologies) and the Register of Copyrights (given the Register's expertise in the field of copyright).

PROHIBITING CERTAIN DEVICES

H.R. 2281, as reported by the Committee on the Judiciary, would regulate—in the name of copyright law—the manufacture and sale of devices that can be used to improperly circumvent technological protection measures. The Committee on Commerce adopted an amendment that moves the anti-circumvention provisions out of Title 17 and establishes them as free-standing provisions of law.

The Committee believes that this is the most appropriate way to implement the treaties, in large part because these regulatory provisions have little, if anything, to do with copyright law. The anti-circumvention provisions (and the accompanying penalty provisions for violations of them) would be separate from, and cumulative to, the existing claims available to copyright owners. In the Committee's judgment, it therefore is more appropriate to implement the treaties through free-standing provisions of law rather than codifying them in Title 17.

Article 1, Section 8, Clause 8 of the United States Constitution authorizes the Congress to promulgate laws governing the scope of proprietary rights in, and use privileges with respect to, intangible "works of authorship." As set forth in the Constitution, the fundamental goal is "[t]o promote the Progress of Science and useful Arts. * * *." In the more than 200 years since enactment of the first Federal copyright law in 1790, the maintenance of this balance has contributed significantly to the growth of markets for works of the imagination as well as the industries that use such works.

Congress has historically advanced this constitutional objective by regulating the use of information—not the devices or means by which the information is delivered or used by information consumers—and by ensuring an appropriate balance between the interests of copyright owners and information users. For example, Section 106 of the Copyright Act (17 U.S.C. § 106) establishes certain rights copyright owners have in their works, including limitations on the use of these works without their authorization. Likewise, Sections 107 through 121 of the Copyright Act (17 U.S.C. §§ 107–121) set forth the circumstances in which such uses will be deemed permissible, or otherwise lawful even though unauthorized. And Sections 501 through 511, as well as Section 602 of the Copyright Act (17 U.S.C. §§ 501–511, 602) specify rights of action for copyright infringement, and prescribe penalties in connection with those actions.

In general, all of these provisions are technology neutral. They do not regulate commerce in information technology, i.e., products and devices for transmitting, storing, and using information. Instead, they prohibit certain actions and create exceptions to permit certain conduct deemed to be in the greater public interest, all in a way that balances the interests of copyright owners and users of copyrighted works. In a September 16, 1997, letter to Congress, 62 copyright law professors expressed their concern about the implications of regulating devices in the name of copyright law. They said in relevant part:

> Although [they] would be codified in Title 17, [the anti-circumvention provisions] would not be an ordinary copyright provision; liability under the section would result from conduct separate and independent from any act of copyright infringement or any intent to promote infringement. Thus, enactment of [the anti-circumvention provisions] would represent an unprecedented departure into the zone of what might be called paracopyright—an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct

> which traditionally has fallen outside the regulatory sphere of intellectual property law.

While the Committee on Commerce agrees with these distinguished professors, the Committee also recognizes that the digital environment poses a unique threat to the rights of copyright owners, and as such, necessitates protection against devices that undermine copyright interests. In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate. As technology advances, so must our laws. The Committee thus seeks to protect the interests of copyright owners in the digital environment, while ensuring that copyright law remain technology neutral. Hence, the Committee has removed the anti-circumvention provisions from Title 17, and established them as free-standing provisions of law.

FAIR USE IN THE DIGITAL ENVIRONMENT

H.R. 2281, as reported by the Committee on the Judiciary, provided that "[n]o person shall circumvent a technological protection measure that effectively controls access to a work protected under Title 17, United States Code." The Committee on Commerce devoted substantial time and resources to analyzing the implications of this broad prohibition on the traditional principle of "fair use." A recent editorial by the Richmond Times-Dispatch succinctly states the Committee's dilemma:

> Copyrights traditionally have permitted public access while protecting intellectual property. The U.S. approach—known as "fair use"—benefits consumers and creators. A computer revolution that has increased access to information also creates opportunities for the holders of copyrights to impose fees for, among other things, research and the use of excerpts from published works. And digital technology—whatever that means—could be exploited to erode fair use.[1]

The principle of fair use involves a balancing process, whereby the exclusive interests of copyright owners are balanced against the competing needs of users of information. This balance is deeply embedded in the long history of copyright law. On the one hand, copyright law for centuries has sought to ensure that authors reap the rewards of their efforts and, at the same time, advance human knowledge through education and access to society's storehouse of knowledge on the other. This critical balance is now embodied in Section 106 of the Copyright Act (17 U.S.C. § 106), which grants copyright holders a "bundle" of enumerated rights, and in Section 107, which codifies the "fair use" doctrine. Under the Copyright Act, "fair use" may be made of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching * * * scholarship or research" under certain circumstances without the permission of the author.

Fair use, thus, provides the basis for many of the most important day-to-day activities in libraries, as well as in scholarship and edu-

[1] Fair Use, Richmond Times-Dispatch, July 13, 1998, at A–6.

cation. It also is critical to advancing the personal interests of consumers. Moreover, as many testified before the Committee, it is no less vital to American industries, which lead the world in technological innovation. As more and more industries migrate to electronic commerce, fair use becomes critical to promoting a robust electronic marketplace. The Committee on Commerce is in the midst of a wide-ranging review of all issues relating to electronic commerce, including the issues raised by this legislation. The digital environment forces this Committee to understand and, where necessary, modernize the rules of commerce as they apply to a digital environment—including the rules that ensure that consumers have a stake in the growth in electronic commerce.

The Committee was therefore concerned to hear from many private and public interests that H.R. 2281, as reported by the Committee on the Judiciary, would undermine Congress' long-standing commitment to the concept of fair use. A June 4, 1998, letter to the Committee from the Consumers' Union is representative of the concerns raised by the fair use community in reaction to H.R. 2281, as reported by the Committee on the Judiciary. The letter states in part:

> These newly-created rights will dramatically diminish public access to information, reducing the ability of researchers, authors, critics, scholars, teachers, students, and consumers to find, to quote for publication and otherwise make fair use of them. It would be ironic if the great popularization of access to information, which is the promise of the electronic age, will be short-changed by legislation that purports to promote this promise, but in reality puts a monopoly stranglehold on information.

The Committee on Commerce felt compelled to address these risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a "pay-per-use" society. At the same time, however, the Committee was mindful of the need to honor the United States' commitment to effectively implement the two WIPO treaties, as well as the fact that fair use principles certainly should not be extended beyond their current formulation. The Committee has struck a balance that is now embodied in Section 102(a)(1) of the bill, as reported by the Committee on Commerce. The Committee has endeavored to specify, with as much clarity as possible, how the right against anti-circumvention would be qualified to maintain balance between the interests of content creators and information users. The Committee considers it particularly important to ensure that the concept of fair use remains firmly established in the law. Consistent with the United States" commitment to implement the two WIPO treaties, H.R. 2281, as reported by the Committee on Commerce, fully respects and extends into the digital environment the bedrock principle of "balance" in American intellectual property law for the benefit of both copyright owners and users.

PROMOTING ENCRYPTION RESEARCH

H.R. 2281, as reported by the Committee on the Judiciary, provided no exception for the field of encryption research to the bill's

broad prohibition against the circumvention of technological protection measures. Recognizing the importance of the field of encryption research to electronic commerce, the Committee on Commerce crafted a provision that provides for an exception to the bill's anti-circumvention provisions.

The effectiveness of technological protection measures to prevent theft of works depends, in large part, on the rapid and dynamic development of better technologies, including encryption-based technological protection measures. The development of encryption sciences requires, in part, ongoing research and testing activities by scientists of existing encryption methods, in order to build on those advances, thus promoting and advancing encryption technology generally. This testing could involve attempts to circumvent or defeat encryption systems for the purpose of detecting flaws and learning how to develop more impregnable systems. The goals of this legislation would be poorly served if these provisions had the undesirable and unintended consequence of chilling legitimate research activities in the area of encryption.

In many cases, flaws in cryptography occur when an encryption system is actually applied. Research of such programs as applied is important both for the advancement of the field of encryption and for consumer protection. Electronic commerce will flourish only if legitimate encryption researchers discover, and correct, the flaws in encryption systems before illegitimate hackers discover and exploit these flaws. Accordingly, the Committee has fashioned an affirmative defense to permit legitimate encryption research.

PROTECTING PERSONAL PRIVACY IN THE DIGITAL ENVIRONMENT

H.R. 2281, as reported by the Committee on the Judiciary, contains numerous protections to protect the rights of copyright owners to ensure that they feel secure in releasing their works in a digital, on-line environment. The Committee on Commerce, however, believes that in reaching to protect the rights of copyright owners, Congress need not encroach upon the privacy interests of consumers.

Digital technology is robust and versatile enough that it can surreptitiously gather consumers' personal information, and do so through the use of software that is protected, or "cloaked," by a technological protection measure. And to the extent a consumer seeks to disable the gathering of such information, he or she may unwittingly violate the provisions of this bill. The Committee regards this as an extreme result, and believes that consumers must be accorded certain rights to protect their personal privacy.

The Committee on Commerce adopted an amendment to strike a balance between the interests of copyright owners and the personal privacy of consumers. The amendment deals with the critical issue of privacy by creating a marketplace incentive for copyright owners to deal "above board" with consumers on personal data gathering practices. Indeed, the copyright community itself has expressed a strong desire to give consumers comfort in knowing that their personal privacy is being protected. The Committee views consumer confidence as critical to promoting a robust and reliable marketplace for electronic commerce. Once consumers are confident that their personal privacy is protected, this should all but eliminate the

need for consumers to circumvent technological protection measures for the purpose of protecting their privacy. Copyright owners can help consumers to realize confidence in the digital environment by disclosing personal data gathering practices.

HEARINGS

The Subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing on H.R. 2281 on June 5, 1998. The Subcommittee received testimony from: Mr. Marc Rotenberg, Director, Electronic Privacy Information Center; Mr. Gary Shapiro, President, Consumer Electronics Manufacturers Association; Mr. Jonathan Callas, Chief Technology Officer, Network Associates, Inc.; Mr. Chris Bryne, Director of Intellectual Property, Silicon Graphics, Inc., representing Information Technology Industry Council; Mr. Robert Holleyman, CEO, Business Software Alliance; Ms. Hilary Rosen, President and CEO, Recording Industry Association of America; Mr. Walter H. Hinton, Vice President, Strategy and Marketing, Storage Technology Corp.; Mr. George Vradenburg, III, Senior Vice President and General Counsel, America OnLine, Inc.; Mr. Steve Metalitz, Vice President, International Intellectual Property Alliance, representing the Motion Picture Association of America; Mr. Seth Greenstein, representing Digital Media Association [listed on witness list]; Mr. Robert Oakley, Director of the Law Library, Georgetown University Law Center; and Mr. Charles E. Phelps, Provost, University of Rochester.

COMMITTEE CONSIDERATION

The Subcommittee on Telecommunications, Trade, and Consumer Protection met in open markup session on June 17, 1998, and June 18, 1998, to consider H.R. 2281, a bill to amend Title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty. On June 18, 1998, the Subcommittee approved H.R. 2281, the Digital Millennium Copyright Act of 1998, for Full Committee consideration, amended, by a voice vote. On July 17, 1998, the Committee on Commerce met in open markup session and ordered H.R. 2281 reported to the House, amended, by a roll call vote of 41 yeas to 0 nays.

ROLL CALL VOTES

Clause 2(l)(2)(B) of Rule XI of the Rules of the House requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. A motion by Mr. Bliley to order H.R. 2281 reported to the House, amended, was agreed to by a roll call vote of 41 yeas to 0 nays. The following are the recorded vote on motion to report H.R. 2281, including the names of those Members voting for and against, and the voice votes taken on amendments offered to H.R. 2281.

COMMITTEE ON COMMERCE – 105TH CONGRESS
ROLL CALL VOTE #56

BILL: H.R. 2281, Digital Millennium Copyright Act of 1998

MOTION: Motion by Mr. Bliley to order H.R. 2281 reported to the House, amended.

DISPOSITION: **AGREED TO,** by a roll call vote of 41 yeas to 0 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Bliley	X			Mr. Dingell			
Mr. Tauzin	X			Mr. Waxman	X		
Mr. Oxley	X			Mr. Markey	X		
Mr. Bilirakis				Mr. Hall	X		
Mr. Schaefer	X			Mr. Boucher	X		
Mr. Barton				Mr. Manton	X		
Mr. Hastert				Mr. Towns	X		
Mr. Upton	X			Mr. Pallone			
Mr. Stearns	X			Mr. Brown	X		
Mr. Paxon				Mr. Gordon	X		
Mr. Gillmor	X			Ms. Furse	X		
Mr. Klug	X			Mr. Deutsch	X		
Mr. Greenwood				Mr. Rush	X		
Mr. Crapo	X			Ms. Eshoo	X		
Mr. Cox	X			Mr. Klink	X		
Mr. Deal	X			Mr. Stupak	X		
Mr. Largent	X			Mr. Engel	X		
Mr. Burr	X			Mr. Sawyer	X		
Mr. Bilbray	X			Mr. Wynn	X		
Mr. Whitfield	X			Mr. Green			
Mr. Ganske	X			Ms. McCarthy	X		
Mr. Norwood	X			Mr. Strickland	X		
Mr. White	X			Ms. DeGette	X		
Mr. Coburn							
Mr. Lazio							
Mrs. Cubin	X						
Mr. Rogan	X						
Mr. Shimkus	X						

7/17/98

COMMITTEE ON COMMERCE — 105TH CONGRESS
VOICE VOTES
7/17/98

BILL: H.R. 2281, Digital Millennium Copyright Act of 1998

AMENDMENT: Amendment by Mr. Tauzin, #1, to provide an exception to the anti-circumvention provisions of the bill for legitimate encryption research purposes.

DISPOSITION: AGREED TO by a voice vote.

AMENDMENT: Amendment by Mr. Markey, #2, to clarify the privacy provisions in the bill to ensure that consumers are capable of protecting their personal information while at the same time still protecting copyrighted works.

DISPOSITION: AGREED TO by a voice vote.

AMENDMENT: Amendment by Mr. Stearns, #3, to provide for a process to define the term technological protection measure.

DISPOSITION: WITHDRAWN by unanimous consent.

AMENDMENT: Amendment by Mr. Dingell, #4, to extend the existing National Telecommunications Information Administration (NTIA) study to cover a determination of the impact of the anti-circumvention provisions on research and development, including reverse engineering.

DISPOSITION: AGREED TO by a voice vote.

AMENDMENT: Amendment by Mr. Klug, #5, to provide a process for the Secretary of Commerce to waive the implementation of rules preventing circumvention of a technological protection measure in certain circumstances for classes of copyrighted works.

DISPOSITION: AGREED TO by a voice vote.

AMENDMENT: Amendment by Mr. White, #6, to clarify that the anti-circumvention provisions of the bill and the corresponding civil remedies do not infringe on the rights of users to exercise their First Amendment rights.

DISPOSITION: AGREED TO by a voice vote.

AMENDMENT: Amendment by Mr. White, #7, to require the Secretary of Commerce to conduct a study on the relationship between the development of electronic commerce and copyright law and report to Congress within one year after enactment.

DISPOSITION: AGREED TO by a voice vote.

AMENDMENT: Amendment by Mr. White, #8, to provide a framework that allows for negotiations between Internet broadcasters and content providers on royalty payments and for temporary storage of copyrighted content in computer servers.

DISPOSITION: WITHDRAWN by unanimous consent.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(l)(3)(A) of Rule XI of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

Pursuant to clause 2(l)(3)(D) of Rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 2(l)(3)(B) of Rule XI of the Rules of the House of Representatives, the Committee finds that H.R 2281, the Digital Millennium Copyright Act of 1998, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(l)(3)(C) of Rule XI of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 22, 1998.

Hon. TOM BLILEY,
Chairman, Committee on Commerce,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2281, Digital Millennium Copyright Act of 1998.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Hadley (for federal costs), Pepper Santalucia (for the state and local impact), and Matt Eyles (for the private-sector impact).

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

H.R. 2281—Digital Millennium Copyright Act of 1998

Summary: H.R. 2281 would amend existing copyright laws to implement two World Intellectual Property Organization (WIPO) treaties, limit the liability of Internet providers for copyright infringe-

ment by their customers, clarify the treatment of ephemeral recordings, and require the study of various issues related to copyrights and emerging technologies.

Assuming the appropriation of the necessary funds, CBO estimates that implementing H.R. 2281 would result in new federal spending of about $2 million in fiscal year 1999 and less than $250,000 a year over the 2000–2003 period. Enacting the bill would establish new criminal penalties and thus could affect both receipts and direct spending. Hence, pay-as-you-go procedures would apply, but CBO expects that any changes in receipts and direct spending would not be significant.

H.R. 2281 contains an intergovernmental and a private-sector mandate as defined in the Unfunded Mandates Reform Act (UMRA), but the costs of the mandates would not exceed the thresholds in the law. (The thresholds are $50 million and $100 million in 1996, respectively, indexed annually for inflation.)

Estimated cost to the Federal Government: For the purpose of this estimate, CBO assumes that H.R. 2281 will be enacted by the end of fiscal year 1998, and that the estimated amounts will be appropriated by the start of each fiscal year. The costs of this legislation fall within budget function 370 (commerce and housing credit).

Title I of H.R. 2281 would amend U.S. copyright law to comply with two treaties produced by the December 1996 conference of the WIPO—one regarding the use of copyrighted material in digital environments and the other dealing with international copyright protection of performers and producers of phonograms. Title II would limit the liability for copyright infringement of persons who are providers of on-line services or network access. Title III would clarify the treatment of ephemeral recordings and exempt libraries and archives from some provisions of this bill. Title IV would require the National Telecommunications and Information Administration (NTIA) to submit a report on encryption testing methods and mechanisms to encourage access protocols.

H.R. 2281 would require the Register of Copyrights, the Secretary of Commerce, the Assistant Secretary of Commerce for Communications and Information, and the NTIA to submit six reports on issues related to copyrights in the digital age, including encryption, distance learning, liability of educational institutions, personal identifying information, and electronic commerce. In addition, title I would require the Secretary of Commerce to issue regulations prohibiting any person from circumventing technological protection measures on copyrighted works. Assuming the appropriation of the necessary amounts, producing reports and promulgating regulations required by H.R. 2281 would increase federal spending by about $2 million in fiscal year 1999 and less than $250,000 a year over the 2000–2003 period.

The bill would establish new criminal penalties and thus could affect both receipts and direct spending; therefore, pay-as-you-go procedures would apply. Section 105 would establish criminal fines of up to $1 million for anyone attempting to circumvent copyright protection systems, or falsifying or altering copyright management information. Enacting this provision could increase governmental receipts from the collection of fines, but we estimate that any such increase would be less than $500,000 annually. Criminal fines are

deposited in the Crime Victims Fund and are spent in the following year. Thus any change in direct spending from the fund would also amount to less than $500,000 annually.

Pay-as-you-go considerations: The Balanced Budget and Emergency Deficit Control Act specifies pay-as-you-go procedures for legislation affecting direct spending and receipts. Enacting H.R. 2281 could affect both direct spending and receipts, but CBO estimates that any such changes would be insignificant.

Intergovernmental and private-sector impact: Section 4 of UMRA excludes from the application of that act any legislative provisions that are necessary for the ratification or implementation of international treaty obligations. CBO has determined that title I of the bill fits within that exclusion because it is necessary for the implementation of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Title III of H.R. 2281, however, would impose a mandate on certain owners of copyrights who apply technical protections to works that prevent their reproduction. Title III would require copyright owners who employ mechanisms that prevent the reproduction of copyrighted works to make available to federally licensed broadcasters the necessary means to copy such works. Under current law, federally licensed broadcasters are authorized to reproduce copyright-protected material under specific conditions. Since this mandate would apply to both public and private entities that own copyrights, it would be considered both a private-sector and an intergovernmental mandate.

However, the use of reproduction protections envisioned in the bill is not yet widespread. Furthermore, copyright owners may claim economic hardship or technological infeasibility to avoid the new requirement, and the costs of providing federally licensed broadcasters with the means to copy technically protected works would likely be modest. Therefore, CBO estimates that the direct cost of the new mandates would be well below the statutory thresholds in UMRA.

Previous CBO estimate: On May 12, 1998, CBO transmitted an estimate of H.R. 2281 as ordered reported by the House Committee on the Judiciary on April 1, 1998. The Judiciary Committee's version of the bill included the first two titles, but did not require any of the reports required by the Commerce Committee's version. CBO estimated that enactment of the Judiciary Committee's version of H.R. 2281 would have no significant impact on the federal budget.

Estimate prepared by: Federal Costs: Mark Hadley. Impact on State, Local, and Tribal Governments: Pepper Santalucia. Impact on the Private Sector: Matt Eyles.

Estimate approved by: Paul N. Van de Water, Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 2(l)(4) of Rule XI of the Rules of the House of Representatives, the Committee finds that the Constitutional authority for this legislation is provided in Article I, section 8, clause 3, which grants Congress the power to regulate commerce with foreign nations, among the several States, and with the Indian tribes.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 establishes that this Act may be cited as the "Digital Millennium Copyright Act of 1998."

Section 2. Table of contents

Section 2 sets out the table of contents.

TITLE I—WIPO TREATIES IMPLEMENTATION

Section 101. Short title

Section 101 establishes that the short title of Title I is the "WIPO Copyright Treaties Implementation Act."

Section 102. Circumvention of copyright protection systems

As previously discussed in the background section to this report, the Committee was concerned that H.R. 2281, as reported by the Committee on the Judiciary, would undermine Congress' longstanding commitment to the principle of fair use. Throughout our history, the ability of individual members of the public to access and to use copyrighted materials has been a vital factor in the advancement of America's economic dynamism, social development, and educational achievement. In its consideration of H.R. 2281, the Committee on Commerce paid particular attention to how changing technologies may affect users' access in the future. Section 102(a)(1) of the bill responds to this concern.

The growth and development of the Internet has already had a significant positive impact on the access of American students, researchers, consumers, and the public at large to informational resources that help them in their efforts to learn, acquire new skills, broaden their perspectives, entertain themselves, and become more active and informed citizens. A plethora of information, most of it embodied in materials subject to copyright protection, is available to individuals, often for free, that just a few years ago could have been located and acquired only through the expenditure of consid-

erable time, resources, and money. New examples of this greatly expanded availability of copyrighted materials occur every day.

Still, the Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors. This result could flow from a confluence of factors, including the elimination of print or other hard-copy versions, the permanent encryption of all electronic copies, and the adoption of business models that depend upon restricting distribution and availability, rather than upon maximizing it. In this scenario, it could be appropriate to modify the flat prohibition against the circumvention of effective technological measures that control access to copyrighted materials, in order to ensure that access for lawful purposes is not unjustifiably diminished.

Given the threat of a diminution of otherwise lawful access to works and information, the Committee on Commerce believes that a "fail-safe" mechanism is required. This mechanism would monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.

Section 102(a)(1) of the bill creates such a mechanism. It converts the statutory prohibition against the act of circumvention into a regulation, and creates a rulemaking proceeding in which the issue of whether enforcement of the regulation should be temporarily waived with regard to particular categories of works can be fully considered and fairly decided on the basis of real marketplace developments that may diminish otherwise lawful access to works.

(a) Violations regarding circumvention of technological protection measures

Section 102(a)(1) gives two responsibilities to the Secretary of Commerce. The first is to issue regulations against the circumvention of technological protection measures that effectively control access to a copyrighted work. The second is to convene a rulemaking proceeding and, in conjunction with other specified officials, to determine whether to waive the applicability of the regulations for the next two years with respect to any particular category of copyrighted materials.

The Secretary's responsibility under subparagraph (A) is essentially ministerial. He or she is to simply recast, in the form of a regulation, the statutory prohibition against the act of circumvention of technological protection measures that effectively control access to copyrighted materials that was set forth in Section 102(a)(1) prior to its amendment.

The Committee has chosen a regulatory, rather than a statutory, route for establishing this prohibition for only one reason: to provide greater flexibility in enforcement, through the rulemaking proceeding set forth in the subsequent subparagraphs of this subsection 102(a)(1). It does not intend to make any substantive change in the scope or meaning of the prohibition as it appeared in the bill prior its amendment, and it is not empowering the Sec-

retary of Commerce to do so either. The regulation should conform in every particular to the provisions of the statute, which addresses all other relevant aspects of the regulatory prohibition, including exceptions (such as for privacy or for encryption research) as well as civil and criminal enforcement mechanisms and penalties. No additional definitions, limitations, defenses or other provisions may be added. The regulation is to take effect two years after the enactment of the statute.

Subparagraph (B) sets forth the parameters of the Secretary's second responsibility: the convening of a rulemaking proceeding, consistent with the requirements of the Administrative Procedures Act. The goal of the proceeding is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works is adversely affecting the ability of individual users to make lawful uses of copyrighted works. Many such technological protection measures are in effect today: these include the use of "password codes" to control authorized access to computer programs, for example, or encryption or scrambling of cable programming, videocassettes, and CD–ROMs. More such measures can be expected to be introduced in the near future. The primary goal of the rulemaking proceeding is to assess whether the prevalence of these technological protections, with respect to particular categories of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful.

The main purpose for delaying for two years the effective date of the prohibition against circumvention of access control technologies is to allow the development of a sufficient record as to how the implementation of these technologies is affecting availability of works in the marketplace for lawful uses. The Committee also intends that the rulemaking proceeding should focus on distinct, verifiable and measurable impacts; should not be based upon *de minimis* impacts; and will solicit input to consider a broad range of evidence of past or likely adverse impacts.

The criteria listed in subparagraph (B) are illustrative of the questions that the rulemaking proceeding should ask. In each case, the focus must remain on whether the implementation of technological protection measures (such as encryption or scrambling) has caused adverse impact on the ability of users to make lawful uses. Adverse impacts that flow from other sources, or that are not clearly attributable to implementation of a technological protection measure, are outside the scope of the rulemaking. The rulemaking will be repeated on a biennial basis, and on each occasion, the assessment of adverse impacts on particular categories of works is to be determined de novo. The regulatory prohibition is presumed to apply to any and all kinds of works, including those as to which a waiver of applicability was previously in effect, unless, and until, the Secretary makes a new determination that the adverse impact criteria have been met with respect to a particular class and therefore issues a new waiver. In conducting the rulemaking proceeding, the Secretary must consult closely with the National Telecommunications and Information Administration, as well as with the Patent and Trademark Office and the Register of Copyrights.

Subparagraph (C) spells out the determination that the Secretary must make at the conclusion of the rulemaking proceeding. If the rulemaking has produced insufficient evidence to determine whether there have been adverse impacts with respect to particular classes of copyrighted materials, the circumvention prohibition should go into effect with respect to those classes. Only in categories as to which the Secretary finds that adverse impacts have occurred, or that such impacts are likely to occur within the next two years, should he or she waive the applicability of the regulations for the next two years.

The issue of defining the scope or boundaries of a "particular class" of copyrighted works as to which the implementation of technological protection measures has been shown to have had an adverse impact is an important one to be determined during the rulemaking proceedings. In assessing whether users of copyrighted works have been, or are likely to be adversely affected, the Secretary shall assess users' ability to make lawful uses of works "within each particular class of copyrighted works specified in the rulemaking." The Committee intends that the "particular class of copyrighted works" be a narrow and focused subset of the broad categories of works of authorship than is identified in Section 102 of the Copyright Act (17 U.S.C. § 102). The Secretary's determination is inapplicable in any case seeking to enforce any other provision of this legislation, including the manufacture or trafficking in circumvention devices that are prohibited by Section 102(a)(2) or 102(b)(1).

To provide meaningful protection and enforcement of the copyright owner's right to control access to his or her copyrighted work (as defined under Section 102(a)(1)), Section 102(a)(2) supplements Section 102(a)(1) with prohibitions on creating and making available certain technologies, products and services used, developed or advertised to defeat technological protection measures that protect against unauthorized access.[2]

Specifically, Section 102(a)(2) prohibits any person from manufacturing, importing, offering to the public, providing, or otherwise trafficking in certain technologies, products, services, devices, components, or parts that can be used to circumvent a technological protection measure that otherwise effectively controls access to a copyrighted work. The Committee believes it is very important to emphasize that Section 102(a)(2) is aimed fundamentally at outlawing so-called "black boxes" that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work. This provision is not aimed at products that are capable of commercially significant noninfringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette recorders, telecommunications switches, personal computers, and servers—used by businesses and consumers for perfectly legitimate purposes.

[2] The Committee has previously reported laws that similarly protect against unauthorized access to works. See, e.g., 47 U.S.C. § 553(a)(2) (prohibiting the manufacture or distribution of equipment intended for the unauthorized reception of cable television service); 47 U.S.C. § 605(e)(4) (prohibiting the manufacture, assembly, import, and sale of equipment used in the unauthorized decryption of satellite cable programming); see also H. Rep. No. 780, 102d Cong., 2d Sess. (1992) (report accompanying H.R. 4567, which would have established the Audio Home Recording Act's anti-circumvention provisions as free-standing provisions of law).

Thus, for a technology, product, service, device, component, or part thereof to be prohibited under this subsection, one of three conditions must be met. It must: (1) be primarily designed or produced for the purpose of circumventing; (2) have only a limited commercially significant purpose or use other than to circumvent; or (3) be marketed by the person who manufactures it, imports it, offers it to the public, provides it or otherwise traffics in it, or by another person acting in concert with that person with that person's knowledge, for use in circumventing a technological protection measure that effectively controls access to a copyrighted work. This provision is designed to protect copyright owners, and simultaneously allow the development of technology.

Section 102(a)(3) defines certain terms used throughout Section 102(a). Subparagraph (A) defines the term "circumvent a technological protection measure" as meaning "to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological protection measure, without the authority of the copyright owner." This definition applies to subsection (a) only, which covers protections against unauthorized initial access to a copyrighted work. Subparagraph (B) states that a technological protection measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work. In the Committee's view, measures that can be deemed to "effectively control access to a work" would be those based on encryption, scrambling, authentication, or some other measure which requires the use of a "key" provided by a copyright owner to gain access to a work.

(b) Additional violations

Section 102(b) applies to those technological protection measures employed by copyright owners that effectively protect their copyrights, as opposed to those technological protection measures covered by Section 102(a), which prevent unauthorized access to a copyrighted work. Unlike subsection (a), which prohibits the circumvention of access control technologies, subsection (b) does not, by itself, prohibit the circumvention of effective technological copyright protection measures.

Paralleling Section 102(a)(2), Section 102(b)(1) seeks to provide meaningful protection and enforcement of copyright owners' use of technological protection measures to protect their rights by prohibiting the act of making or selling the technological means to overcome these protections and thereby facilitate copyright infringement. Subsection (b)(1) prohibits manufacturing, importing, offering to the public, providing, or otherwise trafficking in certain technologies, products, services, devices, components, or parts thereof that can be used to circumvent a technological protection measure that effectively protects a right of a copyright owner. As previously stated in the discussion of Section 102(a)(2), the Committee believes it is very important to emphasize that Section 102(b)(1) is aimed fundamentally at outlawing so-called "black boxes" that are expressly intended to facilitate circumvention of technological protection measures for purposes of gaining access to a work. This pro-

vision is not aimed at products that are capable of commercially significant noninfringing uses, such as consumer electronics, telecommunications, and computer products—including videocassette recorders, telecommunications switches, personal computers, and servers—used by businesses and consumers for perfectly legitimate purposes.

Thus, once again, for a technology, product, service, device, component, or part thereof to be prohibited under this subsection, one of three conditions must be met. It must: (1) be primarily designed or produced for the purpose of circumventing; (2) have only limited commercially significant purpose or use other than to circumvent; or (3) be marketed by the person who manufactures it, imports it, offers it to the public, provides it, or otherwise traffics in it, or by another person acting in concert with that person with that person's knowledge, for use in circumventing a technological protection measure that effectively protects the right of a copyright owner. Like Section 102(a)(2), this provision is designed to protect copyright owners, and simultaneously allow the development of technology.

Section 102(b)(2) defines certain terms used solely within subsection (b). In particular, subparagraph (A) defines the term "circumvent protection afforded by a technological protection measure" as "avoiding, bypassing, removing, deactivating, or otherwise impairing a technological protection measure." Subparagraph (B) provides that a technological protection measure "effectively protects a right of a copyright owner" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a copyright owner's rights. In the Committee's view, measures that can be deemed to "effectively control access to a work" would be those based on encryption, scrambling, authentication, or some other measure which requires the use of a "key" provided by a copyright owner to gain access to a work.

With respect to the effectiveness of technological protection measures, the Committee believes it is important to stress as well that those measures that cause noticeable and recurring adverse effects on the authorized display or performance of works should not be deemed to be effective. Unless product designers are adequately consulted about the design and implementation of technological protection measures (and the means of preserving copyright management information), such measures may cause severe "playability" problems. The Committee on Commerce is particularly concerned that the introduction of such measures not impede the introduction of digital television monitors or new digital audio playback devices. The Committee has a strong, long-standing interest in encouraging the introduction in the market of exciting new products. Recently, for example, the Committee learned that, as initially proposed, a proprietary copy protection scheme that is today widely used to protect analog motion pictures could have caused significant viewability problems, including noticeable artifacts, with certain television sets until it was modified with the cooperation of the consumer electronics industry.

Under the bill as reported, nothing would make it illegal for a manufacturer of a product or device (to which Section 102 would otherwise apply) to design or modify the product or device solely to

the extent necessary to mitigate a frequently occurring and noticeable adverse effect on the authorized performance or display of a work that is caused by a technological protection measure in the ordinary course of its design and operation. Similarly, recognizing that a technological protection measure may cause a problem with a particular device, or combination of devices, used by a consumer, it is the Committee's view that nothing in the bill should be interpreted to make it illegal for a retailer or individual consumer to modify a product or device solely to the extent necessary to mitigate a noticeable adverse effect on the authorized performance or display of a work that is communicated to or received by that particular product or device if that adverse effect is caused by a technological protection measure in the ordinary course of its design and operation.

The Committee believes that the affected industries should be able to work together to avoid such problems. The Committee is aware that multi-industry efforts to develop copy control technologies that are both effective and avoid such noticeable and recurring adverse effects have been underway over the past two years. The Committee strongly encourages the continuation of those efforts, which it views as offering substantial benefits to copyright owners in whose interest it is to achieve the introduction of effective technological protection (and copyright management information) measures that do not interfere with the normal operations of affected products.

(c) Other rights, etc., not affected

Subsection (c) sets forth several provisions clarifying the scope of Section 102. Section 102(c)(1) provides that Section 102 shall not have any effect on rights, remedies, limitations, or defenses to copyright infringement, including fair use, under Title 17. Section 102(c)(2) provides that Section 102 shall not alter the existing doctrines of contributory or vicarious liability for copyright infringement in connection with any technology, product, service, device, component or part thereof. Section 102(c)(3) clarifies that nothing in Section 102 creates an affirmative mandate requiring manufacturers of consumer electronics, telecommunications, and computing products to design their products or their parts and components to affirmatively respond to any particular technological protection measure employed to protect a copyrighted work. Lastly, Section 102(c)(4) makes clear that nothing in Section 102 enlarges or diminishes any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

(d) Exemption for nonprofit libraries, archives, and educational institutions

Section 102(d) provides a limited exemption from the regulations issued pursuant to Section 102(a)(1)(A) to qualified nonprofit libraries, archives, and educational institutions. In particular, Section 102(d)(1) allows a nonprofit library, nonprofit archives or nonprofit educational institution to obtain access to a copyrighted work for the sole purpose of making a good faith determination as to whether it wishes to acquire a copy, or portion of a copy, of that work in order to engage in permitted conduct. A qualifying institution

may not gain access for a period of time longer than necessary to determine whether it wishes to obtain a copy, or portion of a copy, for such purposes, and the right to gain access shall not apply for any other purpose. Section 102(d)(2) provides that the right to obtain access under this paragraph only applies when the nonprofit library, nonprofit archives, or nonprofit educational institution cannot obtain a copy of an identical work by other means, and such an entity may not use the exemption in this paragraph for commercial advantage or financial gain without penalty.

Section 102(d)(3) seeks to protect the legitimate interests of copyright owners by providing a civil remedy against a library, archive, or educational institution that violates Section 102(d)(1). Section 102(d)(4) provides that this subsection may not be used as a defense to the prohibitions on manufacturing or selling devices contained in Sections 102(a)(2) or 102(b). Finally, Section 102(d)(5) provides that a library or archive, to be eligible for the exemption in paragraph (1), must maintain its collections open to the public and available, not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.

(e) Law enforcement and intelligence activities

Section 102(e) creates an exception for the lawfully authorized investigative, protective, or intelligence activities of an officer, agent, or employee of, the United States, a State, or a political subdivision of a State, or of persons acting pursuant to a contract with such an entity.

(f) Reverse engineering

Section 102(f) is intended to promote reverse engineering by permitting the circumvention of access control technologies for the sole purpose of achieving software interoperability. Section 102(f)(1) permits the act of circumvention in only certain instances. To begin with, the copy of the computer program which is the subject of the analysis must be lawfully acquired (i.e., the computer program must be acquired from a legitimate source, along with any necessary serial codes, passwords, or other such means as may be necessary to be able to use the program as it was designed to be used by a consumer of the product). In addition, the acts must be limited to those elements of the program which must be analyzed to achieve interoperability of an independently created program with other programs. The resulting product must also be a new and original work, in that it may not infringe the original computer program. Moreover, the objective of the analysis must be to identify and extract such elements as are necessary to achieve interoperability which are not otherwise available to the person. Finally, the goal of this section is to ensure that current law is not changed, and not to encourage or permit infringement. Thus, each of the acts undertaken must avoid infringing the copyright of the author of the underlying computer program.

Section 102(f)(2) recognizes that, to accomplish the acts permitted under Section 102(f)(1), a person may need to make and use certain tools. The Committee believes that such tools are generally available and used by programmers today in developing computer

programs (e.g., compilers, trace analyzers, and disassemblers). Such tools are not prohibited by this Section. But the Committee also recognizes that, in certain instances, it is possible that a person may need to develop special tools to achieve the permitted purpose of interoperability. Thus, Section 102(f)(2) creates an exception to the prohibition on making circumvention tools contained in Sections 102(a)(2) and 102(b)(1). These excepted tools can be either software or hardware. Once again, though, Section 102(f)(2) limits any person from acting in a way that constitutes infringing activity.

Similarly, Section 102(f)(3) recognizes that developing complex computer programs often involves the efforts of many persons. For example, some of these persons may be hired to develop a specific portion of the final product. For that person to perform these tasks, some of the information acquired through the permitted analysis, and the tools to accomplish it, may have to be made available to that person. Section 102(f)(3) allows developers of independently created software to rely on third parties either to develop the necessary circumvention tools, or to identify the necessary information to achieve interoperability. The ability to rely on third parties is particularly important for small software developers who do not have the capability of performing these functions in-house. This provision permits such sharing of information and tools.

The Committee, however, recognizes that making such information or tools generally available could undermine the objectives of Section 102. Section 102(f)(3) therefore imposes strict limitations on the exceptions created in Section 102(f). Acts of sharing information and tools is permitted solely for the purpose of achieving interoperability of an independently created computer program with other programs. If a person makes this information available for a purpose other than to achieve interoperability of an independently created computer program with other programs, then such action is a violation of this Act. In addition, these acts are permitted only to the extent that doing so does not constitute infringement, or violate other applicable law.

Section 102(f)(4) defines "interoperability" as the ability of computer programs to exchange information, and for such programs mutually to use the information which has been exchanged. The seamless exchange of information is a key element of software interoperability. Hence, Section 102(f) applies to computer programs as such, regardless of their medium of fixation and not to works generally, such as music or audiovisual works, which may be fixed and distributed in digital form. Because the goal of interoperability is the touchstone of the exceptions contained in Section 102(f), the Committee emphasizes that nothing in those subsections can be read to authorize the circumvention of any technological protection measure that controls access to any work other than a computer program, or the trafficking in products or services for that purpose.

(g) Encryption research

As previously discussed in the background section to this report, the Committee views encryption research as critical to the growth and vibrancy of electronic commerce. Section 102(g) therefore pro-

vides statutory clarification for the field of encryption research, in light of the prohibitions otherwise contained in Section 102. Section 102(g)(1) defines "encryption research" and "encryption technology." Section 102(g)(2) identifies permissible encryption research activities, notwithstanding the provisions of Section 102(a)(1)(A), including: whether the person lawfully obtained the encrypted copy; the necessity of the research; whether the person made a good faith effort to obtain authorization before circumventing; and whether the research constitutes infringement or a violation of other applicable law.

The Committee recognizes that courts may be unfamiliar with encryption research and technology, and may have difficulty distinguishing between a legitimate encryption research and a so-called "hacker" who seeks to cloak his activities with this defense. Section 102(g)(3) therefore contains a non-exhaustive list of factors a court shall consider in determining whether a person properly qualifies for the encryption research defense.

Section 102(g)(4) is concerned with the development and distribution of tools—typically software—which are needed to conduct permissible encryption research. In particular, subparagraph (A) provides that it is not a violation of Section 102(a)(2) to develop and employ technological means to circumvent for the sole purpose of performing acts of good faith encryption research permitted under Section 102(g)(2). Subparagraph (B) permits a person to provide such technological means to another person with whom the first person is collaborating in good faith encryption research permitted under Section 102(g)(2). Additionally, a person may provide the technological means to another person for the purpose of having the second person verify the results of the first person's good faith encryption research.

The Committee is aware of additional concerns that Section 102 might inadvertently restrict a systems operator's ability to perform certain functions critical to the management of sophisticated computer networks. For example, many independent programmers have created utilities designed to assist in the recovery of passwords or password-protected works when system users have forgotten their passwords. Because Section 102 prohibits circumvention without the authorization of the copyright owner, circumvention to gain access to one's own work, as a matter of logic, does not violate Section 102.

The law would also not prohibit certain kinds of commercial "key-cracker" products, e.g., a computer program optimized to crack certain "40-bit" encryption keys. Such machines are often rented to commercial customers for the purpose of quick data recovery of encrypted data. Again, if these products do not meet any of the three criteria under Section 102(a)(2) because these products facilitate a person's access to his or her own works, they would not be prohibited by Section 102.

In addition, network and web site management programs increasingly contain components that test systems security and identify common vulnerabilities. These programs are valuable tools for systems administrators and web site operators to use in the course of their regular testing of their systems' security. The testing of such "firewalls" does not violate Section 102 because in most cases

the firewalls are protecting computer and communications systems and not necessarily the specific works stored therein. Accordingly, it is the view of the Committee that no special exception is needed for these types of legitimate products.

Finally, Section 102(g)(5) requires the Assistant Secretary of Commerce for Communications and Information to report to Congress, within one year of enactment, on the effect Section 102(g) has had on the field of encryption research, the adequacy of technological protection for copyrighted works, and protection of copyright owners against unauthorized access.

(h) Components or parts to prevent access of minors to the Internet

The Committee is concerned that Section 102(a) might inadvertently make it unlawful for parents to protect their children from pornography and other harmful material available on the Internet, or have unintended legal consequences for manufacturers of products designed solely to enable parents to protect their children in this fashion. Section 102(h) addresses these concerns.

(i) Protection of personally identifying information

As previously stated in the background section to this report, Section 102(i)(1) is designed to ensure that if a copyright owner conspicuously discloses that the technological protection measure, or any work it protects, contains any personal data gathering capability, and the consumer is given the capability to curtail or prohibit effectively any such gathering or dissemination of personal information, then the consumer could not legally circumvent the technological protection measure. In addition, under Section 102(i)(2), if the copyright holder conspicuously discloses that the technological protection measure, or any work it protects, does not contain the capability of collecting or disseminating personally identifying information reflecting the on-line activities of a person who seeks to gain access to the work protected, then (once again) the consumer could not legally circumvent the technological protection measure.

In both such circumstances, there would be no need for consumers to circumvent technological protection measures because conspicuous disclosures indicate whether data gathering is being conducted and if so, the capability for thwarting such privacy invasions is extended to consumers. Only if there is no disclosure of privacy-related practices, or instances where consumers are left without the capability to disable the gathering of personal information, could a consumer circumvent a technological protection measure to protect his or her own privacy.

Section 103. Integrity of copyright management information

Section 103 implements the obligation contained in Article 12 of the Copyright Treaty and Article 19 of the Performances and Phonograms Treaty that contracting parties "provide adequate and effective legal remedies" against any person who knowingly and without authority removes or alters copyright management information (CMI), or who distributes, imports, broadcasts, or commu-

nicates to the public, works or copies of works knowing that such information has been removed or altered without authority.

(a) False copyright management information

Section 103(a) establishes a general prohibition against intentionally providing false copyright management information, as defined in subsection (c), and against distributing, or importing for distribution, false copyright management information.

(b) Removal or alteration of copyright management information

Section 103(b) establishes general prohibitions against removing or altering CMI, against distributing or importing for distribution altered CMI, and against distributing, importing for distribution or publicly performing works in which CMI has been removed.

(c) Definitions

Section 103(c) defines "copyright management information." To fall within the definition, the information must be conveyed in connection with copies or phonorecords, performances or displays of the copyrighted work.

(d) Law enforcement and intelligence activities

Section 103(d) creates an exception for the lawfully authorized investigative, protective, or intelligence activities of an officer, agent, or employee of, the United States, a State, or a political subdivision of a State, or of persons acting pursuant to a contract with such an entity.

(e) Limitations on liability

Section 103(e) recognizes special problems that certain broadcasting or cable entities may have with the transmission of copyright management information. Under Section 103(e), radio and television broadcasters, cable systems, and persons who provide programming to such broadcasters or systems, who do not intend to induce, enable, facilitate or conceal infringement may be eligible for a limitation on liability for violation of the copyright management information provisions of Section 103(b) in certain, limited situations.

In the case of an analog transmission, Section 103(e)(1) provides that an eligible person will not be held liable for violating provisions of subsection (b) if it is not "technically feasible" for that person to avoid the violation or if avoiding the violation would "create an undue financial hardship." Avoiding a violation of subsection (b) with respect to the transmission of credits that are of an excessive duration in relation to standard practice in the relevant industries (for instance, the motion picture and television broadcast industries) is one example of an activity that may "create an undue financial hardship" under Section 103(e)(1). As indicated above, this limitation on liability applies only if such person did not intend, by engaging in such activity, to induce, enable, facilitate, or conceal infringement.

Section 103(e)(2) provides a limitation on liability in the case of a digital transmission, and contemplates voluntary digital trans-

mission standards for the placement of copyright management information. Separate standards are likely to be set for the location of copyright management information in different categories of works. For instance, the standard(s) for the location of the name of the copyright owner in a sound recording or musical work to be broadcast by radio stations may differ—and be set in a separate standard-setting process—from the standard for the location of such information in a motion picture to be broadcast by television stations.

Paragraph (2)(A) provides that if a digital transmission standard for the placement of copyright management information for a category of works is set in a voluntary, consensus standard-setting process involving a representative cross-section of the relevant copyright owners and relevant transmitting industry, including, but not limited to, representatives of radio or television broadcast stations, cable systems, and copyright owners of a category of works that are intended for public performance by such stations or systems, an eligible person will not be liable for a violation of subsection (b) if the copyright management information involved in the violation was not placed in a location specified by the standard for that information. The eligible person, however, cannot qualify for this limitation on liability if that person was responsible for the nonconforming placement.

Section 103(e)(2)(B)(i) provides that until such a standard is set for a category of works, an eligible person will not be liable for a violation of subsection (b) if the transmission of the copyright management information would cause a perceptible visual or aural degradation of the digital signal. Section 103(e)(2)(B)(ii) provides that during this time period before a standard is set, an eligible person also will not be liable if the digital transmission of the information would conflict with an applicable government regulation or industry standard relating to transmission of information in a digital signal, such as the regulation requiring the placement of closed captioning in line 21 of the vertical blanking interval (47 U.S.C. § 613; 47 C.F.R. § 79.1). For purposes of this paragraph, however, the applicable industry-wide standard must be of a type specified in subparagraphs (2)(B)(ii) (II) or (III). The first type, defined in paragraph (2)(B)(ii)(II), includes only those standards that were adopted by a voluntary, consensus standards body, such as the Advanced Television Systems Committee, before the effective date of Section 103. The other type, defined in subparagraph (2)(B)(ii)(III), includes only those standards adopted in a voluntary, consensus standards-setting process open to participation by groups, including but not limited to a representative cross-section of radio or television broadcast stations, cable systems, and copyright owners of a category of works that are intended for public performance by such stations or systems.

Section 104. Civil remedies

(a) Civil actions

Section 104(a) sets forth the general proposition that civil remedies are available for violations of Sections 102 and 103. This provision also establishes the jurisdiction for such civil actions as the

"appropriate U.S. district court" and limits standing to those persons injured by a violation of Sections 102 or 103.

(b) Powers of the court

Section 104(b) defines the powers of the court hearing a case brought under Section 104(a).

(c) Award of damages

Section 104(c) is divided into five paragraphs, each of which addresses the awarding of damages to a prevailing party in an action brought under Section 104(a).

Section 105. Criminal offenses and penalties

(a) In general

Section 105(a) provides for criminal penalties for violations of Sections 102 and 103.

(b) Limitation for nonprofit library, archives, or educational institution

Section 105(b) exempts completely any nonprofit library, nonprofit archives, or nonprofit educational institution from the criminal penalties contained in subsection (a).

(c) Statute of limitations

Section 105(c) provides for a 5-year statute of limitations for criminal offenses.

Section 106. Savings clause

Section 106 establishes that nothing in Title I in any way limits the applicability of Federal or State privacy laws relating to the use of the Internet.

Section 107. Development and implementation of technological protection measures

Section 107 establishes a mechanism for monitoring, evaluating, and informing the Congress of the impact of this legislation, especially on the key issue of the role of technological protection measures.

(a) Statement of congressional policy and objective

Section 107(a) expresses the sense of Congress that technological protection measures, developed by the private sector through voluntary, industry-led processes, will play a crucial role in the healthy development of the Internet and other new paths for dissemination of copyrighted materials. Such measures can facilitate lawful uses of such materials, while safeguarding the private property interests that are recognized by the copyright law. Section 107(a) thus identifies an open, voluntary, multi-industry process for expeditious implementation of these technological protection measures.

(b) Technological protection measures

Section 107(b) mandates at least three technological protection measures for implementation pursuant to Section 107(a) that are especially important in achieving the full potential of the Internet and other digital media: (1) those that enable nonprofit libraries to continue in their critical role of lending copyrighted materials to individual patrons; (2) those that effectively protect against infringement of copyrighted materials; and (3) those that facilitate a diversity of legitimate uses, by individual members of the public, of copyrighted works in digital formats.

(c) Procedures for developing and implementing technological protection measures

Section 107(c) makes clear that Congress anticipates that the technological protection measures whose development and implementation are mandated pursuant to Section 107(a) will: be developed pursuant to a broad, private sector consensus; be made available on reasonable and non-discriminatory terms; and not impose substantial costs or burdens on copyright owners or on manufacturers of hardware and software used in conjunction with copyrighted works in digital formats.

(d) Oversight and reporting

Section 107(d) establishes an oversight process for monitoring the impact of this legislation, and specifically its anti-circumvention provisions, on the access of individuals to copyrighted materials in digital formats. For example, the Secretary would have to evaluate the extent to which Section 102 and the regulations issued thereunder pose a serious impediment to the development and production of competitive goods and services. It specifically directs the Secretary of Commerce, in consultation with the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information, to report, over the course of the next three years, annually to the House Committees on Commerce and on the Judiciary, and the Senate Committees on Commerce, Science, and Transportation and on the Judiciary on the extent of that impact.

Section 108. Technical amendments

Section 108 incorporates numerous technical amendments.

Section 109. Effective date.

Section 109 makes the effective date the date of enactment.

TITLE II—INTERNET COPYRIGHT INFRINGEMENT LIABILITY

The liability of on-line service providers and Internet access providers for copyright infringements that take place in the on-line environment has been a controversial issue. Title II of the Digital Millennium Copyright Act addresses this complex issue. Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers con-

cerning their legal exposure for infringements that may occur in the course of their activities.

New Section 512 contains limitations on service providers' liability for five general categories of activity set forth in subsections (a) through (d) and subsection (f). As provided in subsection (k), new Section 512 is not intended to imply that a service provider is or is not liable as an infringer either for conduct that qualifies for a limitation of liability or for conduct that fails to so qualify. Rather, the limitations of liability apply if the provider is found to be liable under existing principles of law.

The limitations in subsections (a) through (d) protect qualifying service providers from liability for all monetary relief for direct, vicarious and contributory infringement. Monetary relief is defined in subsection (j)(2) as encompassing damages, costs, attorneys' fees, and any other form of monetary payment. These subsections also limit injunctive relief against qualifying service providers to the extent specified in subsection (i). To qualify for these protections, service providers must meet the conditions set forth in subsection (h), and service providers' activities at issue must involve a function described in subsection (a), (b), (c), (d) or (f), respectively. The liability limitations apply to networks "operated by or for the service provider," thereby protecting both service providers who offer a service and subcontractors who may operate parts of, or an entire, system or network for another service provider.

Section 201. Short title

Section 201 establishes the short title for Title II as the "Internet Copyright Infringement Liability Clarification Act of 1998."

Section 202. Limitations on liability for Internet copyright infringement

(a) In general

Section 202(a) amends chapter 5 of the Copyright Act (17 U.S.C. § 501, et seq.) to create a new Section 512, titled "Liability of service providers for on-line infringement of copyright." New Section 512(a) applies to communications functions associated with sending digital communications of others across digital networks, such as the Internet and other on-line networks. It establishes a limitation on liability for infringements that may occur in the provision of services falling within the definition of subsection (j)(1)(A). The limitations on injunctive relief set forth in subsection (i)(1)(B) are applicable when the functions at issue fall within the provisions of subsection (a), and the service provider meets the threshold criteria of subsection (h). These threshold criteria apply to all of the liability limitations contained in new Section 512.

Subsection (a) applies to service providers transmitting, routing, or providing connections for material, and some forms of intermediate and transient storage of material in the course of performing these functions. For example, in the course of moving packets of information across digital on-line networks, many intermediate and transient copies of the information may be made in routers and servers along the way. Such copies are created as an automatic consequence of the transmission process. In this context, "inter-

mediate and transient" refers to such a copy made and/or stored in the course of a transmission, not a copy made or stored at the points where the transmission is initiated or received. The use of the term "transmitting" throughout new Section 512 is not intended to be limited to transmissions of "a performance or display" of "images or sounds" within the meaning of Section 101 of the Copyright Act.

Subsections (a)(1) through (5) limit the range of activities that qualify under this subsection to ones in which a service provider plays the role of a "conduit" for the communications of others. This limitation on liability applies if: (1) the communication was initiated by or at the direction of a person other than the service provider; (2) it is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another; (4) no copy of the material made in the course of intermediate or transient storage is maintained on the system or network so that it is ordinarily accessible to anyone other than the anticipated recipients, and no copy is maintained on the system or network in a manner ordinarily accessible to the anticipated recipients for a longer period than is reasonably necessary for the communication; and (5) the content (but not necessarily the form) of the material is not modified in the course of transmission. Thus, for example, an e-mail transmission may appear to the recipient without bolding or italics resulting from format codes contained in the sender's message.

The term "selection of the material" in subsection (a)(2) means the editorial function of determining what material to send, or the specific sources of material to place on-line (e.g., a radio station), rather than "an automatic technical process" of responding to a command or request, such as one from a user, an Internet location tool, or another network. The term "automatic response to the request of another" is intended to encompass a service provider's actions in responding to requests by a user or other networks, such as requests to forward e-mail traffic or to route messages to a mailing list agent (such as a "Listserv") or other discussion group. The Committee intends subsection (a)(4) to cover copies made of material while it is en route to its destination, such as copies made on a router or mail server, storage of a web page in the course of transmission to a specific user, store and forward functions, and other transient copies that occur en route. The term "ordinarily accessible" is intended to encompass stored material that is routinely accessible to third parties. For example, the fact that an illegal intruder might be able to obtain access to the material would not make it ordinarily accessible to third parties. Neither, for example, would occasional access in the course of maintenance by service provider personnel, nor access by law enforcement officials pursuant to subpoena make the material "ordinarily accessible." However, the term does not include copies made by a service provider for the purpose of making the material available to other users. Such copying is addressed in subsection (b).

New Section 512(b) applies to a different form of intermediate and temporary storage than is addressed in subsection (a). In ter-

minology describing current technology, this storage is a form of "caching," which is used on some networks to increase network performance and to reduce network congestion generally, as well as to reduce congestion and delays to popular sites. This storage is intermediate in the sense that the service provider serves as an intermediary between the originating site and the ultimate user. The material in question is stored on the service provider's system or network for some period of time to facilitate access by users subsequent to the one who previously sought access to it. For subsection (b) to apply, the material must be made available on an originating site, transmitted at the direction of another person through the system or network operated by or for the service provider to a different person, and stored through an automatic technical process so that users of the system or network who subsequently request access to the material from the originating site may obtain access to the material from the system or network.

Subsections (b)(1) through (b)(5) clarify the circumstances under which subsection (b) applies. Subsection (b)(1) provides that the material must be transmitted to subsequent users without modification to its content in comparison to the way it was originally transmitted from the originating site. The Committee intends that this restriction apply, for example, so that a service provider who caches material from another site does not change the advertising associated with the cached material on the originating site without authorization from the originating site.

Subsection (b)(2) limits the applicability of the subsection to circumstances where the service provider complies with certain updating commands.

Subsection (b)(3) provides that the service provider shall not interfere with the ability of certain technology that is associated with the work by the operator of the originating site to return to the originating site information, such as user "hit" counts, that would have been available to the site had it not been cached. The technology, however, must: (i) not significantly interfere with the performance of the storing provider's system or network or with intermediate storage of the material; (ii) be consistent with generally accepted industry standard communications protocols applicable to Internet and on-line communications, such as those approved by the Internet Engineering Task Force and the World Wide Web Consortium; and (iii) not extract information beyond that which would have been obtained had the subsequent users obtained access to the material directly on the originating site.

Subsection (b)(4) applies to circumstances in which the originating site imposes a prior condition on access.

Subsection (b)(5) establishes a notification and take-down procedure for cached material modeled on the procedure under new Section 512(c). However, this take-down obligation does not apply unless the material has previously been removed from the originating site, or the party submitting the notification has obtained a court order for it to be removed from the originating site and notifies the service provider's designated agent of that order. This proviso has been added to subsection (b)(5) because storage under subsection (b) occurs automatically, and unless infringing material has been

removed from the originating site, the infringing material would ordinarily simply be re-cached.

New Section 512(c) limits the liability of qualifying service providers for claims of direct, vicarious and contributory infringement for storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider. Examples of such storage include providing server space for a user's web site, for a chatroom, or other forum in which material may be posted at the direction of users. Subsection (c) defines the scope of this limitation on liability. It also sets forth procedural requirements that copyright owners or their agents and service providers must follow with respect to notifications of claimed infringement under subsection (c)(3). Information that resides on the system or network operated by or for the service provider through its own acts or decisions and not at the direction of a user does not fall within the liability limitation of subsection (c).

New subsection (c)(1)(A) sets forth the applicable knowledge standard. This standard is met either by actual knowledge of infringement or, in the absence of such knowledge, by awareness of facts or circumstances from which infringing activity is apparent. The term "activity" is intended to mean activity using the material on the system or network. The Committee intends such activity to refer to wrongful activity that is occurring at the site on the provider's system or network at which the material resides, regardless of whether copyright infringement is technically deemed to occur at that site or at the location where the material is received. For example, the activity at an on-line site offering audio or video may be unauthorized public performance of a musical composition, a sound recording, or an audio-visual work, rather than (or in addition to) the creation of an unauthorized copy of any of these works.

New subsection (c)(1)(A)(ii) can best be described as a "red flag" test. As stated in new subsection (c)(l), a service provider need not monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure complying with new subsection (h)), in order to claim this limitation on liability (or, indeed any other limitation provided by the legislation). However, if the service provider becomes aware of a "red flag" from which infringing activity is apparent, it will lose the limitation of liability if it takes no action. The "red flag" test has both a subjective and an objective element. In determining whether the service provider was aware of a "red flag," the subjective awareness of the service provider of the facts or circumstances in question must be determined. However, in deciding whether those facts or circumstances constitute a "red flag"—in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances—an objective standard should be used.

New subsection (c)(1)(A)(iii) provides that once a service provider obtains actual knowledge or awareness of facts or circumstances from which infringing material or activity on the service provider's system or network is apparent, the service provider does not lose the limitation of liability set forth in subsection (c) if it acts expeditiously to remove or disable access to the infringing material. Because the factual circumstances and technical parameters may vary

from case to case, it is not possible to identify a uniform time limit for expeditious action.

New subsection (c)(1)(B) sets forth the circumstances under which a service provider would lose the protection of subsection (c) by virtue of its benefit from and control over infringing activity. In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one. In general, a service provider conducting a legitimate business would not be considered to receive a "financial benefit directly attributable to the infringing activity" where the infringer makes the same kind of payment as non-infringing users of the provider's service. Thus, receiving a one-time set-up fee and flat, periodic payments for service from a person engaging in infringing activities would not constitute receiving a "financial benefit directly attributable to the infringing activity." Nor is subsection (c)(1)(B) intended to cover fees based on the length of the message (e.g., per number of bytes) or by connect time. It would however, include any such fees where the value of the service lies in providing access to infringing material.

New subsection (c)(1)(C) establishes that in cases where a service provider is notified of infringing activity by a copyright owner or its authorized agent, in accordance with the notification procedures of new subsection (c)(3), the limitation on the service provider's liability shall be maintained only if the service provider acts expeditiously either to remove the infringing material from its system or to prevent further access to the infringing material on the system or network. This "notice and take-down" procedure is a formalization and refinement of a cooperative process that has been employed to deal efficiently with network-based copyright infringement.

The Committee emphasizes that new Section 512 does not specifically mandate use of a notice and take-down procedure. Instead, a service provider wishing to benefit from the limitation on liability under new subsection (c) must "take down" or disable access to infringing material residing on its system or network in cases where it has actual knowledge or that the criteria for the "red flag" test are met—even if the copyright owner or its agent does not notify it of a claimed infringement. On the other hand, the service provider is free to refuse to "take down" the material or site—even after receiving a notification of claimed infringement from the copyright owner. In such a situation, the service provider's liability, if any, will be decided without reference to new Section 512(c).

At the same time, copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights. However, neither actual knowledge nor awareness of a "red flag" may be imputed to a service provider based on information from a copyright owner or its agent that does not comply with the notification provisions of new subsection (c)(3), in which case the limitation on liability set forth in new subsection (c) may still apply.

New Section 512(c)(2) provides that to qualify for the limitation on liability in new subsection (c), the service provider must designate an agent to receive notifications under new subsection (c)(1)(C). The designation, provided to the Register of Copyrights, and made available on the service provider's web site, is to contain

certain information necessary to communicate with the service provider concerning allegedly infringing material or activity. The Register of Copyrights is directed to maintain a directory of designated agents available for inspection by the public, both on the web site of the Library of Congress, and in hard copy format on file at the Copyright Office. The Committee does not intend or anticipate that the Register will publish hard copies of the directory. The directory shall have entries for the name, address, telephone number, and electronic mail address of an agent designated by service providers. The service provider's designation shall substantially comply with these elements.

New Section 512(c)(3) sets forth the procedures under which copyright owners and their agents may provide effective notification to a service provider of allegations of infringement on the provider's system or network. New subsection (c)(3)(A) requires that to count as an effective notification, the notification must be in writing and submitted to the service provider's designated agent. New subsections (c)(3)(A)(i)–(vi) then set forth the information to be included in an effective notification. The standard against which a notification is to be judged is one of substantial compliance. New subsection (c)(3)(A)(i) provides that the notification must be signed by the copyright owner, or its authorized agent, to be effective. The requirement for signature, either physical or electronic, relates to the verification requirements of new subsections (c)(3)(A)(v) and (vi). New subsection (c)(3)(A)(ii) requires that the copyright owner identify the copyrighted work alleged to have been infringed. Where multiple works at a single on-line site are covered by a single notification, a representative list of such works at that site is sufficient. Thus, for example, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary that the notification list every musical composition or sound recording that has been, may have been, or could be infringed at that site. Instead, it is sufficient for the copyright owner to provide the service provider with a representative list of those compositions or recordings in order that the service provider can understand the nature and scope of the infringement being claimed.

New subsection (c)(3)(A)(iii) requires that the copyright owner or its authorized agent provide the service provider with information reasonably sufficient to permit the service provider to identify and locate the allegedly infringing material. An example of such sufficient information would be a copy or description of the allegedly infringing material and the so-called "uniform resource locator" (URL) (i.e., web site address) which allegedly contains the infringing material. The goal of this provision is to provide the service provider with adequate information to find and examine the allegedly infringing material expeditiously.

New subsection (c)(3)(A)(iv) requires that the copyright owner or its authorized agent provide reasonably sufficient identifying information concerning the owner or its agent who submits the notification, such as an address, telephone number, and (if available) an electronic mail address so that the service provider may contact the complaining party. New subsection (c)(3)(A)(v) makes clear that the notification from complaining parties must contain a statement that the complaining party has a good faith belief that the alleg-

edly infringing use is not authorized by the copyright owner, or its agent, or the law.

New subsection (c)(3)(A)(vi) specifies that the notification must contain a statement that the information contained therein is accurate. The complaining party—be it the copyright owner, or an authorized representative—also must confirm under penalty of perjury, that it has authority to act on behalf of the owner of the exclusive right that is allegedly being infringed. The term "perjury" is used in the sense found elsewhere in the United States Code. See, e.g., 28 U.S.C. § 1746; 18 U.S.C. § 1621.

New subsection (c)(3)(B) addresses the effect of notifications that do not substantially comply with the requirements of new subsection (c)(3). Under new subsection (c)(3)(B), the court shall not consider such notifications as evidence of whether the service provider has actual knowledge, is aware of facts or circumstances, or has received a notification for purposes of new subsection (c)(1)(A). However, a defective notice provided to the designated agent may be considered in evaluating the service provider's knowledge or awareness of facts and circumstances, if: (i) the complaining party has provided the requisite information concerning the identification of the copyrighted work, identification of the allegedly infringing material, and information sufficient for the service provider to contact the complaining party; and (ii) the service provider does not promptly attempt to contact the person making the notification or take other reasonable steps to assist in the receipt of notification that substantially complies with new subsection (c)(3)(A). If the service provider subsequently receives a substantially compliant notice, the provisions of new subsection (c)(1)(C) would then apply upon receipt of such notice.

The Committee intends that the substantial compliance standard in new subsections (c)(2) and (c)(3) be applied so that technical errors (e.g., misspelling a name, supplying an outdated area code if the phone number is accompanied by an accurate address, supplying an outdated name if accompanied by an e-mail address that remains valid for the successor of the prior designated agent or agent of a copyright owner) do not disqualify service providers and copyright owners from the protections afforded under subsection (c). The Committee expects that the parties will comply with the functional requirements of the notification provisions—such as providing sufficient information so that a designated agent or the complaining party submitting a notification may be contacted efficiently—in order to ensure that the notification and take-down procedures set forth in this subsection operate efficiently.

New Section 512(d) addresses instances where information location tools refer or link users to an on-line location containing infringing material or infringing activity. The term "infringing activity" means the wrongful activity that is occurring at the location to which the user is linked or referred by the information location tool, without regard to whether copyright infringement is technically deemed to have occurred at that location or at the location where the material is received. The term "information location tools" includes: a directory or index of on-line sites or material, such as a search engine that identifies pages by specified criteria; a reference to other on-line material, such as a list of recommended

sites; a pointer that stands for an Internet location or address; and a hypertext link which allows users to access material without entering its address.

New subsection (d) incorporates the notification and take-down procedures of new subsection (c), and applies them to the provision of references and links to infringing sites. A service provider is entitled to the liability limitations of new subsection (d) if it: (1) lacks actual knowledge of infringement on the other site, and is not aware of facts or circumstances from which infringing activity in that location is apparent; (2) does not receive a financial benefit directly attributable to the infringing activity on the site, where the service provider has the right and ability to control the infringing activity; and (3) responds expeditiously to remove or disable the reference or link upon receiving a notification of claimed infringement as described in new subsection (c)(3). The notification procedures under new subsection (d) follow those set forth in new subsection (c). However, the information submitted by the complaining party under new subsection (c)(3)(A)(iii) is the identification of the reference or link to infringing material or activity, and the information reasonably sufficient to permit the service provider to locate that reference or link.

New Section 512(d) provides a safe harbor that would limit the liability of a service provider that refers or links users to an on-line location containing infringing material or activity by using "information location tools," such as hyperlink directories and indexes. A question has been raised as to whether a service provider would be disqualified from the safe harbor based solely on evidence that it had viewed the infringing Internet site. If so, there is concern that on-line directories prepared by human editors and reviewers, who view and classify various Internet sites, would be denied eligibility to the information location tools safe harbor, in an unintended number of cases and circumstances. This is an important concern because such on-line directories play a valuable role in assisting Internet users to identify and locate the information they seek on the decentralized and dynamic networks of the Internet.

Like the information storage safe harbor in Section 512(c), a service provider would qualify for this safe harbor if, among other requirements, it "does not have actual knowledge that the material or activity is infringing" or, in the absence of such actual knowledge, it is "not aware of facts or circumstances from which infringing activity is apparent." Under this standard, a service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to "red flags" of obvious infringement.

For instance, the copyright owner could show that the provider was aware of facts from which infringing activity was apparent if the copyright owner could prove that the location was clearly, at the time the directory provider viewed it, a "pirate" site of the type described below, where sound recordings, software, movies, or books were available for unauthorized downloading, public performance, or public display. Absent such "red flags" or actual knowledge, a directory provider would not be similarly aware merely because it saw one or more well known photographs of a celebrity at a site devoted to that person. The provider could not be ex-

pected, during the course of its brief cataloguing visit, to determine whether the photograph was still protected by copyright or was in the public domain; if the photograph was still protected by copyright, whether the use was licensed; and if the use was not licensed, whether it was permitted under the fair use doctrine.

The intended objective of this standard is to exclude from the safe harbor sophisticated "pirate" directories—which refer Internet users to other selected Internet sites where pirate software, books, movies, and music can be downloaded or transmitted. Such pirate directories refer Internet users to sites that are obviously infringing because they typically use words such as "pirate," "bootleg," or slang terms in their URL and header information to make their illegal purpose obvious, in the first place, to the pirate directories as well as other Internet users. Because the infringing nature of such sites would be apparent from even a brief and casual viewing, safe harbor status for a provider that views such a site and then establishes a link to it would not be appropriate. Pirate directories do not follow the routine business practices of legitimate service providers preparing directories, and thus evidence that they have viewed the infringing site may be all that is available for copyright owners to rebut their claim to a safe harbor.

In this way, the "red flag" test in new Section 512(d) strikes the right balance. The common-sense result of this "red flag" test is that on-line editors and catalogers would not be required to make discriminating judgments about potential copyright infringement. If, however, an Internet site is obviously pirate, then seeing it may be all that is needed for the service provider to encounter a "red flag." A provider proceeding in the face of such a "red flag" must do so without the benefit of a safe harbor.

Information location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need. Directories are particularly helpful in conducting effective searches by filtering out irrelevant and offensive material. The Yahoo! directory, for example, currently categorizes over 800,000 on-line locations and serves as a "card catalogue" to the World Wide Web, which over 35,000,000 different users visit each month. Directories such as Yahoo!'s usually are created by people visiting sites to categorize them. It is precisely the human judgment and editorial discretion exercised by these cataloguers which makes directories valuable.

This provision is intended to promote the development of information location tools generally, and Internet directories such as Yahoo!'s in particular, by establishing a safe harbor from copyright infringement liability for information location tool providers if they comply with the notice and take-down procedures and other requirements of new subsection (d). The knowledge or awareness standard should not be applied in a manner which would create a disincentive to the development of directories which involve human intervention. Absent actual knowledge, awareness of infringement as provided in new subsection (d) should typically be imputed to a directory provider only with respect to pirate sites or in similarly obvious and conspicuous circumstances, and not simply because the provider viewed an infringing site during the course of assembling the directory.

New Section 512(e) establishes a right of action against any person who knowingly misrepresents that material or activity on-line is infringing, or that material or activity was removed or disabled by mistake or misidentification under the "put-back" procedure set forth in new subsection (f). Actions may be brought under new subsection (e) by any copyright owner, a copyright owner's licensee, or by a service provider, who is injured by such misrepresentation, as a result of the service provider relying upon the misrepresentation in either taking down material or putting material back on-line. Defendants who make such a knowing misrepresentation are liable for any damages, including costs and attorneys" fees, incurred by any of these parties as a result of the service provider's reliance upon the misrepresentation. This subsection is intended to deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights holders, service providers, and Internet users.

New Section 512(f) provides immunity to service providers for taking down infringing material, and establishes a "put back" procedure under which subscribers may contest a complaining party's notification of infringement provided under new subsection (c)(3). The put-back procedures were added to balance the incentives created in new Section 512 for service providers to take down material against third parties' interests in ensuring that material not be taken down. In particular, new subsection (f)(1) immunizes service providers from any claim based on the service provider's good-faith disabling of access to, or removal of, material or activity claimed to be infringing. The immunity also applies where the service provider disables access to, or removes, material or activity based on facts or circumstances from which infringing activity is apparent. This immunity is available even if the material or activity is ultimately determined not to be infringing. The purpose of this subsection is to protect service providers from liability to third parties whose material service providers take down in a good faith effort to comply with the requirements of new subsection (c)(1).

New subsection (f)(2) establishes a "put back" procedure through an exception to the immunity set forth in new subsection (f)(1). The exception applies in a case in which the service provider, pursuant to a notification provided under new subsection (c)(1)(C) in accordance with new subsection (c)(3), takes down material that a subscriber has posted to the system or network. In such instances, to retain the immunity set forth in new subsection (f)(1) with respect to the subscriber whose content is taken down, the service provider must take three steps.

First, under new subsection (f)(2)(A), the service provider is to take reasonable steps to notify the subscriber promptly of the removal or disabling of access to the subscriber's material. The Committee intends that "reasonable steps" include, for example, sending an e-mail notice to an e-mail address associated with a posting, or if only the subscriber's name is identified in the posting, sending an e-mail to an e-mail address that the subscriber submitted with its subscription. The Committee does not intend that this subsection impose any obligation on service providers to search beyond the four corners of a subscriber's posting or their own records for that subscriber in order to obtain contact information. Nor does the

Committee intend to create any right on the part of subscribers who submit falsified information in their postings or subscriptions to complain if a service provider relies upon the information submitted by the subscriber.

Second, pursuant to new subsection (f)(2)(B), the subscriber may then file a counter notification, in accordance with the requirements of new subsection (f)(3), contesting the original take down on grounds of mistake or misidentification of the material and requesting "put back" of the material that the service provider has taken down. If a subscriber files a counter notification with the service provider's designated agent, new subsection (f)(2)(B) calls for the service provider to promptly forward a copy to the complaining party who submitted the take down request.

And third, under new subsection (f)(2)(C), the service provider is to place the subscriber's material back on-line, or cease disabling access to it, between 10 and 14 business days after receiving the counter notification, unless the designated agent receives a further notice from the complaining party that the complaining party has filed an action seeking a court order to restrain the subscriber from engaging in the infringing activity on the service provider's system or network with regard to the material in question.

Subscriber counter notifications must substantially comply with defined requirements set forth in new subsection (f)(3). Notifications shall be signed by the subscriber physically or by electronic signature; identify the material taken down and the location from which it was taken down; include a statement under penalty of perjury that the subscriber has a good faith belief that the material was taken down as a result of mistake or misidentification of the material; and include the subscriber's contact information, as well as a statement consenting to the jurisdiction of a Federal district court and to accept service of process from the complaining party or the complaining party's agent. The substantial compliance standard is the same as that set forth in new subsections (c) (2) and (3).

New subsection (f)(4) is included to make clear the obvious proposition that a service provider's compliance with the put-back procedure does not subject it to liability for copyright infringement or cause it to lose its liability limitation with respect to the replaced material.

New Section 512(g) creates a procedure by which copyright owners or their authorized agents who have submitted or will submit a request for notification satisfying the requirements of new subsection (c)(3)(A) may obtain an order for identification of alleged infringers who are users of a service provider's system or network. Under this procedure, the copyright owner or agent files three documents with the clerk of any Federal district court: a copy of the notification; a proposed order; and a sworn declaration that the purpose of the order is to obtain the identity of an alleged infringer, and that the information obtained will only be used to protect the owner's rights under this Title.

Orders issued under new subsection (g) shall authorize and order the service provider expeditiously to disclose to the person seeking the order information sufficient to identify the alleged infringer to the extent such information is available to the service provider.

The Committee intends that an order for disclosure be interpreted as requiring disclosure of information in the possession of the service provider, rather than obliging the service provider to conduct searches for information that is available from other systems or networks. The Committee intends that such orders be expeditiously issued if the notification meets the provisions of new subsection (c)(3)(A) and the declaration is properly executed. The issuing of the order should be a ministerial function performed quickly for this provision to have its intended effect. After receiving the order, the service provider shall expeditiously disclose to the copyright owner or its agent the information required by the order to the extent that the information is available to the service provider, regardless of whether the service provider responds to the notification of claimed infringement.

New Section 512(h) sets forth two conditions that a service provider must satisfy to be eligible for the limitations on liability provided in new subsections (a) through (d). First, the service provider is expected to adopt and reasonably implement a policy for the termination in appropriate circumstances of the accounts of subscribers[3] of the provider's service who are repeat on-line infringers of copyright. The Committee recognizes that there are different degrees of on-line copyright infringement, from the inadvertent and noncommercial, to the willful and commercial. In addition, the Committee does not intend this provision to undermine the principles of new subsection (l) or the knowledge standard of new subsection (c) by suggesting that a provider must investigate possible infringements, monitor its service, or make difficult judgments as to whether conduct is or is not infringing. However, those who repeatedly or flagrantly abuse their access to the Internet through disrespect for the intellectual property rights of others should know that there is a realistic threat of losing that access.

Second, a provider's system must accommodate, and not interfere with, standard technical measures used to identify or protect copyrighted works. The Committee believes that technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age. For that reason, the Committee has included new subsection (h)(1)(B), which is intended to encourage appropriate technological solutions to protect copyrighted works. The Committee strongly urges all of the affected parties expeditiously to commence voluntary, inter-industry discussions to agree upon and implement the best technological solutions available to achieve these goals.

New subsection (h)(1)(B) is explicitly limited to "standard technical measures" that have been developed pursuant to a broad consensus of both copyright owners and service providers in an open, fair, voluntary, multi-industry standards process. The Committee anticipates that these provisions could be developed both in recognized open standards bodies or in ad hoc groups, as long as the

[3] In using the term "subscribers," the Committee intends to include account holders that have a business relationship with the service provider that justifies treating them as subscribers, for the purposes of new Section 512, even if no formal subscription agreement exists. For example, "subscribers" would include students who are granted access to a university's system or network for digital on-line communications; employees who have access to their employer's system or network; or household members with access to a consumer on-line service by virtue of a subscription agreement between the service provider and another member of that household.

process used is open, fair, voluntary, and multi-industry and the measures developed otherwise conform to the requirements of the definition of standard technical measures set forth in new subsection (h)(2). A number of recognized open standards bodies have substantial experience with Internet issues. The Committee also notes that an ad hoc approach has been successful in developing standards in other contexts, such as the process that has developed copy protection technology for use in connection with digital video disk players.

New Section 512(i) defines the terms and conditions under which an injunction may be issued against a service provider that qualifies for the limitations on liability set forth in new subsections (a) through (d), but is otherwise subject to an injunction under existing principles of law. New subsection (i)(1) limits the scope of injunctive relief that may be ordered against a qualifying provider. New subsection (i)(2) identifies factors a court must consider in deciding whether to grant injunctive relief and in determining the appropriate scope of injunctive relief.

New subsection (i)(1) is divided into two subparagraphs. New subparagraph (A) defines the scope of injunctive relief available against service providers who qualify for the limitations of liability set forth in new subsections (b), (c) or (d). Only three forms of injunctive relief may be granted. First, pursuant to new subsection (i)(1)(A)(i), the court may provide for the removal or blocking of infringing material or activity that is residing at a specific location on the provider's system or network. This is essentially an order to take the actions identified in new subsection (c)(1)(C) to "remove, or disable access" to the material that is claimed to be infringing or to be the subject of infringing activity.

Second, under new subsection (i)(1)(A)(ii), the court may order the provider to terminate the accounts of a subscriber[4] of the provider's service who is engaging in infringing activity. And third, pursuant to new subsection (i)(1)(A)(iii), the court may, under appropriate circumstances, enter a different form of injunction if the court considers it necessary to prevent or restrain infringement of specific copyrighted material that resides at an identified on-line location. If a court enters an injunction other than that contemplated in new subparagraphs (A) (i) or (ii), the court must determine that the injunctive relief is the least burdensome relief to the service provider among those forms of relief that are comparably effective.

New subsection (i)(1)(B) sets forth a different set of remedies available for injunctions against service providers qualifying for the limitation on remedies set forth in new subsection (a). In such cases, if a court determines that injunctive relief is appropriate, it may only grant injunctive relief in one or both of two specified forms. The first, pursuant to new subparagraph (B)(i), is an order to the service provider to terminate subscriber accounts that are specified in the order. The second form of relief, pursuant to new subparagraph (B)(ii) and available in cases in which a provider is engaging in infringing activity relating to a foreign on-line location, is an order to take reasonable steps to block access to a specific,

[4] See supra note 3.

identified foreign on-line location. Such blocking orders are not available against a service provider qualifying under new subsection (a) in the case of infringing activity on a site within the United States or its territories.

New subsection (i)(2) sets forth mandatory considerations for the court beyond those that exist under current law. These additional considerations require the court to consider factors of particular significance in the digital on-line environment. New subsection (i)(3) prohibits most forms of *ex parte* injunctive relief (including temporary and preliminary relief) against a service provider qualifying for a liability limitation under new Section 512. A court may issue an order to ensure the preservation of evidence or where the order will have no material adverse effect on the operation of the provider's network.

New Section 512(j) provides definitions of the term "service provider" as used in this Title, as well as a definition of the term "monetary relief." Only an entity that is performing the functions of a "service provider" is eligible for the limitations on liability set forth in new Section 512 with respect to those functions.

The first definition of a "service provider," set forth in new subsection (j)(1)(A), narrowly defines a range of functions and applies only to use of the term in new subsection (a). As used in new subsection (a), the term "service provider" means any entity offering the transmission, routing or providing of connections for digital on-line communications, between or among points specified by a user, of material of a user's choosing without modification to the content of the material as sent or received. This free-standing definition is derived from the definition of "telecommunications" found in the Communications Act of 1934 (47 U.S.C. § 153(48)) in recognition of the fact that the functions covered by new subsection (a) are essentially conduit-only functions. The Committee, however, has tweaked the definition for purposes of new subsection (j)(1)(A) to ensure that it captures offerings over the Internet and other on-line media. Thus, the definition in new subsection (j)(1)(A) not only includes "the offering of transmission, routing or providing of connections," but also requires that the service provider be providing such services for communications that are both "digital" and "on-line." By "on-line" communications, the Committee means communications over interactive computer networks, such as the Internet. Thus, over-the-air broadcasting, whether in analog or digital form, or a cable television system, or a satellite television service, would not qualify, except to the extent it provides users with on-line access to a digital network such as the Internet, or it provides transmission, routing, or connections to connect material to such a network, and then only with respect to those functions. An entity is not disqualified from being a "service provider" because it alters the form of the material, so long as it does not alter the content of the material. As a threshold matter, a service provider's performance of a particular function with respect to allegedly infringing activity falls within the "service provider" definition in new subsection (j)(1)(A) if and only if such function is within the range of functions defined in new subsection (j)(1)(A). For example, hosting a web site does not fall within the new subsection (j)(1)(A) definition, whereas the mere provision of connectivity to a web site does

fall within that definition. The new subsection (j)(1)(A) definition is not intended to exclude providers that perform additional functions, including the functions identified in new subsection (j)(1)(B). Conversely, the fact that a provider performs some functions that fall within the definition of new subparagraph (A) does not imply that its other functions that do not fall within the definition of new subparagraph (A) qualify for the limitation of liability under new subsection (a).

The second definition of "service provider," set forth in new subsection (j)(1)(B), applies to the term as used in any other new subsection of new Section 512. This definition is broader than the first, covering providers of on-line services or network access, or the operator of facilities therefor. This definition includes, for example, services such as providing Internet access, e-mail, chat room and web page hosting services. The new subsection (j)(1)(B) definition of service provider, for example, includes universities and schools to the extent they perform the functions identified in new subsection (j)(1)(B). The definition also specifically includes any entity that falls within the first definition of service provider. A broadcaster or cable television system or satellite television service would not qualify, except to the extent it performs functions covered by (j)(1)(B).

Finally, new subsection (j)(2) defines the term "monetary relief" broadly for purposes of this Section as encompassing damages, costs, attorneys' fees and any other form of monetary payment.

New Section 512(k) clarifies that other defenses under copyright law are not affected and codifies several important principles. In particular, new Section 512 does not define what is actionable copyright infringement in the on-line environment, and does not create any new exceptions to the exclusive rights under copyright law. The rest of the Copyright Act sets those rules. Similarly, new Section 512 does not create any new liabilities for service providers or affect any defense available to a service provider. Enactment of new Section 512 does not bear upon whether a service provider is or is not an infringer when its conduct falls within the scope of new Section 512. Even if a service provider's activities fall outside the limitations on liability specified in the bill, the service provider is not necessarily an infringer; liability in these circumstances would be adjudicated based on the doctrines of direct, vicarious or contributory liability for infringement as they are articulated in the Copyright Act and in the court decisions interpreting and applying that statute, which are unchanged by new Section 512. In the event that a service provider does not qualify for the limitation on liability, it still may claim all of the defenses available to it under current law. New section 512 simply defines the circumstances under which a service provider, as defined in this new Section, may enjoy a limitation on liability for copyright infringement.

New Section 512(l) is designed to protect the privacy of Internet users. This new subsection makes clear that the applicability of new subsections (a) through (d) is in no way conditioned on a service provider: (1) monitoring its service or affirmatively seeking facts indicating infringing activity except to the extent consistent with implementing a standard technical measure under new subsection (h); or (2) accessing, removing or disabling access to, material if

such conduct is prohibited by law, such as the Electronic Communications Privacy Act.

New Section 512(m) establishes a rule of construction applicable to new subsections (a) through (d). New Section 512's limitations on liability are based on functions, and each limitation is intended to describe a separate and distinct function. Consider, for example, a service provider that provides a hyperlink to a site containing infringing material which it then caches on its system in order to facilitate access to it by its users. This service provider is engaging in at least three functions that may be subject to the limitation on liability: transitory digital network communications under new subsection (a); system caching under new subsection (b); and information location tools under new subsection (d). If this service provider (as defined in new subsection (j)(1)(A) in the case of transitory digital communications, or as defined in new subsection (j)(1)(B) in the case of system caching or information location tools) meets the threshold criteria spelled out in new subsection (h)(1), then for its acts of system caching defined in new subsection (b), it may avail itself of the liability limitations stated in new subsection (b), which incorporate the limitations on injunctive relief described in new subsection (i)(1)(B) and (i)(3). If it is claimed that the same company is committing an infringement by using information location tools to link its users to infringing material, as defined in new subsection (d), then its fulfillment of the requirements to claim the system caching liability limitation does not affect whether it qualifies for the liability limitation for information location tools; the criteria in new subsection (d), rather than those in new subsection (b), are applicable. New Section 512(m) codifies this principle by providing that the determination of whether a service provider qualifies for one liability limitation has no effect on the determination of whether it qualifies for a separate and distinct liability limitation under another new subsection of new Section 512.

(a) Conforming amendment

Section 202(b) amends the table of sections for chapter 5 of the Copyright Act (17 U.S.C. § 501 et seq.) to reflect the new Section 512, as created by this title.

Section 203. Limitation on exclusive rights; computer programs

Section 203 effects a minor, yet important, clarification in Section 117 of the Copyright Act (17 U.S.C. § 117) to ensure that the lawful owner or lessee of a computer machine may authorize an independent service provider—a person unaffiliated with either the owner or lessee of the machine—to activate the machine for the sole purpose of servicing its hardware components.

Section 204. Liability of educational institutions for online infringement of copyright

(a) Recommendations by Register of Copyrights

Section 204(a) directs the Register of Copyrights to consult with representatives of copyright owners and nonprofit educational institutions and to submit to the Congress within 6 months after enactment of the bill recommendations regarding the liability of non-

profit educational institutions for copyright infringements that take place through the use of the institution's computer system or network, where the institution qualifies as a "service provider" under the provisions of this Title. Included in the Register's report are to be any recommendations for legislation that the Register considers appropriate.

(b) Factors

Section 204(b) sets forth specific considerations that the Register shall take into account, where relevant, in formulating recommendations to the Congress.

Section 205. Evaluation of impact of copyright law and amendments on electronic commerce and technological development

As previously stated in the background section to this report, the Committee believes it is important to more precisely evaluate the relationship between intellectual property and electronic commerce, and to understand the practical implications of this relationship on the development of technology to be used in promoting electronic commerce. Section 205 enables Congress to make that evaluation.

(a) Findings

Section 205(a) finds that Congress must have accurate and current information on the effects of intellectual property protection on electronic commerce and technology.

(b) Evaluation by Secretary of Commerce

Section 205(b) directs the Secretary of Commerce, in consultation with the Assistant Secretary of Commerce for Communications and Information and the Register of Copyrights, to evaluate the effects of this legislation on the development of electronic commerce and associated technology, as well as the relationship between existing and emergent technology, on the one hand, and existing copyright law, on the other.

(c) Report to Congress

Section 205(c) directs the Secretary of Commerce to submit a report to Congress, within one year of enactment, on the evaluation required pursuant to Section 205(b).

Section 206. Effective date

Section 206 establishes the effective date for Title II as the date of enactment.

TITLE III—EPHEMERAL RECORDINGS; DISTANCE EDUCATION; EXEMPTION FOR LIBRARIES AND ARCHIVES

Section 301. Ephemeral recordings

Section 301 amends Section 112 of the Copyright Act (17 U.S.C. § 112) to address two issues concerning the application of the ephemeral recording exemption in the digital age. The first of these issues is the relationship between the ephemeral recording exemption and the Digital Performance Right in Sound Recordings Act of 1995 (DPRA). DPRA granted sound recording copyright owners the

exclusive right to perform their works publicly by means of digital audio transmission, subject to certain limitations, particularly those set forth in Section 114(d). Among those limitations is an exemption for non-subscription broadcast transmissions, which are defined as those made by terrestrial broadcast stations licensed as such by the Federal Communications Commission. (17 U.S.C. § 114(d)(1)(A)(iii), (j)(2)). The ephemeral recording exemption presently privileges certain activities of a transmitting organization when it is entitled to transmit a performance or display under a license or transfer of copyright ownership or under the limitations on exclusive rights in sound recordings specified by Section 114(a). The Committee believes that the ephemeral recording exemption should apply to broadcast radio and television stations when they make non-subscription digital broadcasts permitted by DPRA. The Committee has therefore changed the existing language of the ephemeral recording exemption (redesignated as Section 112(a)(1)) to extend explicitly to broadcasters the same privilege they already enjoy with respect to analog broadcasts.

The second of these issues is the relationship between the ephemeral recording exemption and the anti-circumvention provisions that the bill adds as Section 102 of this legislation. Concerns were expressed that if use of copy protection technologies became widespread, a transmitting organization might be prevented from engaging in its traditional activities of assembling transmission programs and making ephemeral recordings permitted by Section 112 for purposes of its own transmissions within its local service area and of archival preservation and security. To address this concern, the Committee has added to Section 112 a new paragraph that permits transmitting organizations to engage in activities that otherwise would violate the regulations to be issued under Section 102(a)(1) in certain limited circumstances when necessary for the exercise of the transmitting organization's privilege to make ephemeral recordings under redesignated Section 112(a)(1). By way of example, if a radio station could not make a permitted ephemeral recording from a commercially available phonorecord without violating the regulations to be issued under Section 102(a)(1), then the radio station could request from the copyright owner the necessary means of making a permitted ephemeral recording. If the copyright owner did not then either provide a phonorecord that could be reproduced or otherwise provide the necessary means of making a permitted ephemeral recording from the phonorecord already in the possession of the radio station, the radio station would not be liable for violating the regulations to be issued under Section 102(a)(1) for taking the steps necessary for engaging in activities permitted under Section 112(a)(1). The radio station would, of course, be liable for violating the regulations to be issued under Section 102(a)(1) if it engaged in activities prohibited by that Section in other than the limited circumstances permitted by Section 112(a)(1).

Section 302. Limitation on exclusive rights; distance education

(a) Recommendations by National Telecommunications and Information Administration

Section 302(a) directs the Assistant Secretary of Commerce for Communications and Information to consult with representatives of copyright owners, non-profit educational institutions, and nonprofit libraries and archives and to submit recommendations to the Congress no later than 6 months after the date of enactment of the bill on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users. Where appropriate, the Assistant Secretary shall include legislative recommendations to achieve those objectives.

(b) Factors

Section 302(b) specifies considerations which the Assistant Secretary of Commerce for Communications and Information shall take into account in formulating such recommendations.

Section 303. Exemption for libraries and archives

Section 303 allows libraries and archives to take advantage of digital technologies when engaging in specified preservation activities.

TITLE IV—RELATED PROVISIONS

Section 401. Report by the National Telecommunications and Information Administration

Section 401 requires the Assistant Secretary of Commerce for Communications and Information to submit a report to Congress, within six months on enactment, on appropriate mechanisms to encourage the development of access protocols, encryption testing methods, and security testing methods which would allow lawful access to, with appropriate safeguards to prevent the unlawful copying of, encrypted works.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 17, UNITED STATES CODE

* * * * * * *

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

* * * * * * *

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

* * * * * * *

[A work is a "Berne Convention work" if—

[(1) in the case of an unpublished work, one or more of the authors is a national of a nation adhering to the Berne Convention, or in the case of a published work, one or more of the authors is a national of a nation adhering to the Berne Convention on the date of first publication;

[(2) the work was first published in a nation adhering to the Berne Convention, or was simultaneously first published in a nation adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention;

[(3) in the case of an audiovisual work—

[(A) if one or more of the authors is a legal entity, that author has its headquarters in a nation adhering to the Berne Convention; or

[(B) if one or more of the authors is an individual, that author is domiciled, or has his or her habitual residence in, a nation adhering to the Berne Convention;

[(4) in the case of a pictorial, graphic, or sculptural work that is incorporated in a building or other structure, the building or structure is located in a nation adhering to the Berne Convention; or

[(5) in the case of an architectural work embodied in a building, such building is erected in a country adhering to the Berne Convention.

For purposes of paragraph (1), an author who is domiciled in or has his or her habitual residence in, a nation adhering to the Berne Convention is considered to be a national of that nation. For purposes of paragraph (2), a work is considered to have been simultaneously published in two or more nations if its dates of publication are within 30 days of one another.]

* * * * * * *

[The "country of origin" of a Berne Convention work, for purposes of section 411, is the United States if] *For purposes of section 411, a work is a "United States work" only if—*

(1) in the case of a published work, the work is first published—

(A) in the United States;

(B) simultaneously in the United States and another [nation or nations adhering to the Berne Convention] *treaty party or parties*, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that [does not adhere to the Berne Convention] *is not a treaty party*; or

(D) in a foreign nation that [does not adhere to the Berne Convention] *is not a treaty party*, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

* * * * * * *

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

[For the purposes of section 411, the "country of origin" of any other Berne Convention work is not the United States.]

* * * * * * *

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is—

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;

(5) the WIPO Copyright Treaty;

(6) the WIPO Performances and Phonograms Treaty; and

(7) any other copyright treaty to which the United States is a party.

* * * * * * *

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

* * * * * * *

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

The "WIPO Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

* * * * * * *

A "work made for hire" is—

(1) * * *

* * * * * * *

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.

* * * * * * *

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a [foreign nation that is a party to a copyright treaty to which the United States is also a party] *treaty party*, or is a stateless person, wherever that person may be domiciled; or

(2) the work is first published in the United States or in a foreign nation that, on the date of first publication, is a [party to the Universal Copyright Convention] *treaty party*; or

(3) the work is a sound recording that was first fixed in a treaty party; or

(4) the work is a [Berne Convention work] *pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party*; or

[(3)] *(5)* the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or

[(5)] *(6)* the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which was first published in that nation. The President may revise, suspend, or revoke any such proclama-

tion or impose any conditions or limitations on protection under a proclamation.

For purposes of paragraph (2), a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be.

* * * * * * *

(d) EFFECT OF PHONOGRAMS TREATIES.—Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.

§ 104A. Copyright in restored works

(a) * * *

* * * * * * *

(h) DEFINITIONS.—For purposes of this section and section 109(a):

(1) The term "date of adherence or proclamation" means the earlier of the date on which a foreign nation which, as of the date the WTO Agreement enters into force with respect to the United States, is not a nation adhering to the Berne Convention or a WTO member country, becomes—

[(A) a nation adhering to the Berne Convention or a WTO member country; or

[(B) subject to a Presidential proclamation under subsection (g).]

(A) a nation adhering to the Berne Convention;

(B) a WTO member country;

(C) a nation adhering to the WIPO Copyright Treaty;

(D) a nation adhering to the WIPO Performances and Phonograms Treaty; or

(E) subject to a Presidential proclamation under subsection (g).

* * * * * * *

[(3) The term "eligible country" means a nation, other than the United States, that—

[(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

[(B) on such date of enactment is, or after such date of enactment becomes, a member of the Berne Convention; or

[(C) after such date of enactment becomes subject to a proclamation under subsection (g).

For purposes of this section, a nation that is a member of the Berne Convention on the date of the enactment of the Uruguay Round Agreements Act shall be construed to become an eligible country on such date of enactment.]

(3) The term "eligible country" means a nation, other than the United States, that—

(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

(B) on such date of enactment is, or after such date of enactment becomes, a nation adhering to the Berne Convention;

(C) adheres to the WIPO Copyright Treaty;

(D) adheres to the WIPO Performances and Phonograms Treaty; or

(E) after such date of enactment becomes subject to a proclamation under subsection (g).

* * * * * * *

(6) The term "restored work" means an original work of authorship that—

(A) * * *

* * * * * * *

(C) is in the public domain in the United States due to—

(i) * * *

* * * * * * *

(iii) lack of national eligibility; **[**and**]**

(D) has at least one author or rightholder who was, at the time the work was created, a national or domiciliary of an eligible country, and if published, was first published in an eligible country and not published in the United States during the 30-day period following publication in such eligible country**[**.**]**; *and*

(E) if the source country for the work is an eligible country solely by virtue of its adherence to the WIPO Performances and Phonograms Treaty, is a sound recording.

* * * * * * *

(8) The "source country" of a restored work is—

(A) a nation other than the United States;

(B) in the case of an unpublished work—

(i) the eligible country in which the author or rightholder is a national or domiciliary, or, if a restored work has more than 1 author or rightholder, *of which* the majority of foreign authors or rightholders are nationals or domiciliaries **[**of eligible countries**]**; or

* * * * * * *

[(9) The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.**]**

* * * * * * *

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives

(a) **[**Notwithstanding**]** *Except as otherwise provided in this title and notwithstanding* the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, *except as provided in subsections (b) and (c)*, or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) * * *

* * * * * * *

(3) the reproduction or distribution of the work includes a notice of copyright *that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.*

(b) The rights of reproduction and distribution under this section apply to [a copy or phonorecord] *three copies or phonorecords* of an unpublished work duplicated [in facsimile form] solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), [if the copy or phonorecord reproduced is currently in the collections of the library or archives.] *if—*

(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

(c) The right of reproduction under this section applies to [a copy or phonorecord] *three copies or phonorecords* of a published work duplicated [in facsimile form] solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, *or if the existing format in which the work is stored has become obsolete,* [if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.] *if—*

(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format except for use on the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

* * * * * * *

§ 112. Limitations on exclusive rights: Ephemeral recordings

(a)*(1)* Notwithstanding the provisions of section 106, and except in the case of a motion picture or other audiovisual work, it is not an infringement of copyright for a transmitting organization entitled to transmit to the public a performance or display of a work, under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings specified by section 114(a), *or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission that broadcasts a performance of a sound recording in a digital format on a nonsubscription basis,* to make no more than

one copy or phonorecord of a particular transmission program embodying the performance or display, if—

[(1)] *(A)* the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and

[(2)] *(B)* the copy or phonorecord is used solely for the transmitting organization's own transmissions within its local service area, or for purposes of archival preservation or security; and

[(3)] *(C)* unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work described in that paragraph is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord within the meaning of that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 102(a)(1) of the WIPO Copyright Treaties Implementation Act for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.

* * * * * * *

§ 117. Limitations on exclusive rights: Computer programs

[Notwithstanding] *(a) MAKING OF ADDITIONAL COPY OR ADAPTATION BY OWNER OF COPY.—Notwithstanding* the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) * * *

* * * * * * *

[Any exact] *(b) LEASE, SALE, OR OTHER TRANSFER OF ADDITIONAL COPY OR ADAPTATION.—Any exact* copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

(c) MACHINE MAINTENANCE OR REPAIR.—Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the

computer program, for purposes only of maintenance or repair of that machine, if—

(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

(d) DEFINITIONS.—For purposes of this section—

(1) the "maintenance" of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

(2) the "repair" of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.

* * * * * * *

CHAPTER 4—COPYRIGHT NOTICE, DEPOSIT, AND REGISTRATION

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§ 411. Registration and infringement actions

(a) Except for [actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and] an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no action for infringement of the copyright in any *United States* work shall be instituted until registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute an action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.

* * * * * * *

CHAPTER 5—COPYRIGHT INFRINGEMENT AND REMEDIES

Sec.
501. Infringement of copyright.

* * * * * * *

512. Liability of service providers for online infringement of copyright.

* * * * * * *

§ 507. Limitations on actions

(a) CRIMINAL PROCEEDINGS.—[No] *Except as expressly provided otherwise in this title, no* criminal proceeding shall be maintained under the provisions of this title unless it is commenced within 5 years after the cause of action arose.

* * * * * * *

§ 512. Liability of service providers for online infringement of copyright

(a) DIGITAL NETWORK COMMUNICATIONS.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or the intermediate and transient storage of such material in the course of such transmitting, routing or providing connections, if—

(1) it was initiated by or at the direction of a person other than the service provider;

(2) it is carried out through an automatic technical process without selection of such material by the service provider;

(3) the service provider does not select the recipients of such material except as an automatic response to the request of another;

(4) no such copy of such material made by the service provider is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to the anticipated recipients for a longer period than is reasonably necessary for the communication; and

(5) the material is transmitted without modification to its content.

(b) SYSTEM CACHING.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the intermediate and temporary storage of material on the system or network controlled or operated by or for the service provider: Provided, That—

(1) such material is made available online by a person other than such service provider,

(2) such material is transmitted from the person described in paragraph (1) through such system or network to someone other than that person at the direction of such other person,

(3) the storage is carried out through an automatic technical process for the purpose of making such material available to users of such system or network who subsequently request access to that material from the person described in paragraph (1):

Provided further, That—

(4) such material is transmitted to such subsequent users without modification to its content from the manner in which the material otherwise was transmitted from the person described in paragraph (1);

(5) such service provider complies with rules concerning the refreshing, reloading or other updating of such material when specified by the person making that material available online in accordance with an accepted industry standard data communications protocol for the system or network through which that person makes the material available: Provided further, That the rules are not used by the person described in paragraph (1) to prevent or unreasonably impair such intermediate storage;

(6) such service provider does not interfere with the ability of technology associated with such material that returns to the person described in paragraph (1) the information that would have been available to such person if such material had been obtained by such subsequent users directly from such person: Provided further, That such technology—

(A) does not significantly interfere with the performance of the provider's system or network or with the intermediate storage of the material;

(B) is consistent with accepted industry standard communications protocols; and

(C) does not extract information from the provider's system or network other than the information that would have been available to such person if such material had been accessed by such users directly from such person;

(7) either—

(A) the person described in paragraph (1) does not currently condition access to such material; or

(B) if access to such material is so conditioned by such person, by a current individual pre-condition, such as a pre-condition based on payment of a fee, or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have been so authorized and only in accordance with those conditions; and

(8) if the person described in paragraph (1) makes that material available online without the authorization of the copyright owner, then the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringements described in subsection (c)(3): Provided further, That the material has previously been removed from the originating site, and the party giving the notification includes in the notification a statement confirming that such material has been removed or access to it has been disabled or ordered to be removed or have access disabled.

(c) INFORMATION STORED ON SERVICE PROVIDERS.—

(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A)(i) does not have actual knowledge that the material or activity is infringing,

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent, or

(iii) if upon obtaining such knowledge or awareness, the service provider acts expeditiously to remove or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and

(C) in the instance of a notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) DESIGNATED AGENT.—The limitations on liability established in this subsection apply only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by substantially making the name, address, phone number, electronic mail address of such agent, and other contact information deemed appropriate by the Register of Copyrights, available through its service, including on its website, and by providing such information to the Copyright Office. The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats.

(3) ELEMENTS OF NOTIFICATION.—

(A) To be effective under this subsection, a notification of claimed infringement means any written communication provided to the service provider's designated agent that includes substantially the following—

(i) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed;

(ii) identification of the copyrighted work claimed to have been infringed, or, if multiple such works at a single online site are covered by a single notification, a representative list of such works at that site;

(iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material;

(iv) information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available an electronic mail address at which the complaining party may be contacted;

(v) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, or its agent, or the law; and

(vi) a statement that the information in the notification is accurate, and under penalty of perjury, that the

complaining party has the authority to enforce the owner's rights that are claimed to be infringed.

(B) A notification from the copyright owner or from a person authorized to act on behalf of the copyright owner that fails substantially to conform to the provisions of paragraph (3)(A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent: Provided, That the provider promptly attempts to contact the complaining party or takes other reasonable steps to assist in the receipt of notice under paragraph (3)(A) when the notice is provided to the service provider's designated agent and substantially satisfies the provisions of paragraphs (3)(A) (ii), (iii), and (iv).

(d) INFORMATION LOCATION TOOLS.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the provider referring or linking users to an online location containing infringing material or activity by using information location tools, including a directory, index, reference, pointer or hypertext link, if the provider—

(1) does not have actual knowledge that the material or activity is infringing or, in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent;

(2) does not receive a financial benefit directly attributable to the infringing activity, where the service provider has the right and ability to control such activity; and

(3) responds expeditiously to remove or disable the reference or link upon notification of claimed infringement as described in subsection (c)(3): Provided, That for the purposes of this paragraph, the element in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate such reference or link.

(e) MISREPRESENTATIONS.—Any person who knowingly materially misrepresents under this section—

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by the service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

(f) REPLACEMENT OF REMOVED OR DISABLED MATERIAL AND LIMITATION ON OTHER LIABILITY.—

(1) Subject to paragraph (2) of this subsection, a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based

on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Paragraph (1) of this subsection shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;

(B) upon receipt of a counter notice as described in paragraph (3), promptly provides the person who provided the notice under subsection (c)(1)(C) with a copy of the counter notice, and informs such person that it will replace the removed material or cease disabling access to it in ten business days; and

(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) To be effective under this subsection, a counter notification means any written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which such material appeared before it was removed or access was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notice under subsection (c)(1)(C) or agent of such person.

(4) A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

(g) IDENTIFICATION OF DIRECT INFRINGER.—The copyright owner or a person authorized to act on the owner's behalf may request an order for release of identification of an alleged infringer by filing—

(1) a copy of a notification described in subsection (c)(3)(A), including a proposed order, and

(2) a sworn declaration that the purpose of the order is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of this title, with the clerk of any United States district court.

The order shall authorize and order the service provider receiving the notification to disclose expeditiously to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged direct infringer of the material described in the notification to the extent such information is available to the service provider. The order shall be expeditiously issued if the accompanying notification satisfies the provisions of subsection (c)(3)(A) and the accompanying declaration is properly executed. Upon receipt of the order, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), a service provider shall expeditiously give to the copyright owner or person authorized by the copyright owner the information required by the order, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

(h) CONDITIONS FOR ELIGIBILITY.—

(1) ACCOMMODATION OF TECHNOLOGY.—The limitations on liability established by this section shall apply only if the service provider—

(A) has adopted and reasonably implemented, and informs subscribers of the service of, a policy for the termination of subscribers of the service who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures as defined in this subsection.

(2) DEFINITION.—As used in this section, "standard technical measures" are technical measures, used by copyright owners to identify or protect copyrighted works, that—

(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

(B) are available to any person on reasonable and nondiscriminatory terms; and

(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

(i) INJUNCTIONS.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies by operation of this section.

(1) SCOPE OF RELIEF.—

(A) With respect to conduct other than that which qualifies for the limitation on remedies as set forth in subsection (a), the court may only grant injunctive relief with respect to a service provider in one or more of the following forms—

(i) an order restraining it from providing access to infringing material or activity residing at a particular online site on the provider's system or network;

(ii) an order restraining it from providing access to an identified subscriber of the service provider's system or network who is engaging in infringing activity by terminating the specified accounts of such subscriber; or

(iii) such other injunctive remedies as the court may consider necessary to prevent or restrain infringement of specified copyrighted material at a particular online location: Provided, That such remedies are the least burdensome to the service provider that are comparably effective for that purpose.

(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms—

(i) an order restraining it from providing access to an identified subscriber of the service provider's system or network who is using the provider's service to engage in infringing activity by terminating the specified accounts of such subscriber; or

(ii) an order restraining it from providing access, by taking specified reasonable steps to block access, to a specific, identified, foreign online location.

(2) CONSIDERATIONS.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

(3) NOTICE AND EX PARTE ORDERS.—Injunctive relief under this subsection shall not be available without notice to the service provider and an opportunity for such provider to appear, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

(j) DEFINITIONS.—

(1)(A) As used in subsection (a), the term "service provider" means an entity offering the transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

(B) As used in any other subsection of this section, the term "service provider" means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in the preceding paragraph of this subsection.

(2) As used in this section, the term "monetary relief" means damages, costs, attorneys' fees, and any other form of monetary payment.

(k) OTHER DEFENSES NOT AFFECTED.—The failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense.

(l) PROTECTION OF PRIVACY.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity except to the extent consistent with a standard technical measure complying with the provisions of subsection (h); or

(2) a service provider accessing, removing, or disabling access to material where such conduct is prohibited by law.

(m) RULE OF CONSTRUCTION.—Subsections (a), (b), (c), and (d) are intended to describe separate and distinct functions for purposes of analysis under this section. Whether a service provider qualifies for the limitation on liability in any one such subsection shall be based solely on the criteria in each such subsection and shall not affect a determination of whether such service provider qualifies for the limitations on liability under any other such subsection.

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ADDITIONAL VIEWS OF SCOTT KLUG AND RICK BOUCHER

Although we support the House Commerce Committee's changes and improvements to H.R. 2281, the Digital Millennium Copyright Act of 1998, we remain troubled by the implications of this legislation.

In its original version, H.R. 2281 contained a provision that would have made it unlawful to circumvent technological protection measures that effectively control access to a work, for any reason. In other words, the bill, if passed unchanged, would have given copyright owners the legislative muscle to "lock up" their works in perpetuity—unless each and every one of us separately negotiated for access. In short, this provision converted an unobstructed marketplace that tolerates "free" access in some circumstances to a "pay-per-access" system, no exceptions permitted.

In our opinion, this not only stands copyright law on its head, it makes a mockery of our Constitution. Article I, Section 8, Clause 8 is very clear in its directive: "The Congress shall have Power * * * To Promote the Progress of Science and useful Arts, by securing for *limited* Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries." (emphasis added). Congress has limited these rights both in terms of scope and duration. In interpreting the Copyright Clause, the Supreme Court has said:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and *to allow the public access to the products of their genius after the limited period of exclusive control has expired.* The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. *Sony Corporation* v. *Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984) (emphasis added).

The anti-circumvention language of H.R. 2281, even as amended, bootstraps the limited monopoly into a perpetual right. It also fundamentally alters the balance that has been carefully struck in 200 years of copyright case law, by making the private incentive of content owners the paramount consideration—at the expense of research, scholarship, education, literary or political commentary, indeed, the future viability of information in the public domain. In so doing, this legislation goes well beyond the rights contemplated for copyright owners in the Constitution.

The Klug amendment, representing a compromise between those on the content side and "fair use" proponents, simply delays this

constitutional problem for a period of two years. Delegating authority to develop anti-circumvention regulations to the Secretary of Commerce was a means to eliminate the stalemate that existed, but it is not, by itself a comment on the need for limitations on this anti-circumvention rights. It also strikes us that Congress is not acting prudently by passing a law guaranteed to create lifetime employment for attorneys and copyright specialists, given the constitutional and definitional problems already identified.

What we set out to do was to restore some balance in the discussion and to place private incentive in its proper context. We had proposed to do this by legislating an equivalent fair use defense for the new right to control access. For reasons not clear to us, and despite the WIPO Treaty language "recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information * * *," our proposal was met with strenuous objection. It continued to be criticized even after it had been redrafted, and extensively tailored, in response to the myriad of piracy concerns that were raised.

The compromise amendment that Representative Klug ultimately offered at full committee is silent on the applicability of traditional copyright limitations and defenses, though it does give "information users" the ability to argue that the application of technological protection measures adversely impacts their ability to access information. This diminution in availability includes both access under license terms and traditional free access to information. Our expectation is that the rulemaking will also focus on the extent to which exceptions and limitations to this prohibition are appropriate and necessary to maintain balance in our copyright laws.

In view of this legislation's overwhelming attention to the regulation of devices in other contexts, it should be clearly understood that the Section 102(a)(1) amendment addresses conduct only and does not delegate to the Secretary of Commerce the power to regulate the design of devices.

Moreover, the bill, by its terms (like the WIPO treaties), covers only those measures that are "effective." Pursuant to this limitation, an amendment we offered which was adopted at subcommittee clarified that device and component designers and manufacturers are not under any legal obligation to respond to or to accommodate any particular technological protection measure. Without such clarification, the bill could have been construed as governing not only those technological protection measures that are already "effective", such as those based on encryption, but also those that might conceivably be made "effective" through enactment of the legislation. This result would be a far cry from governing "circumvention." For similar reasons, it was clearly understood in the full committee consideration that a measure is not "effective", and consequently not covered by this bill, to the extent that protecting the measure against circumvention would cause degradation of the otherwise lawful performance of a device or authorized display of a work.

In the end, this legislation purports to protect creators. It may well be that additional protections are necessary, though we think the 1976 Copyright Act is sufficiently flexible to deal with changing

technology. Whatever protections Congress grants should not be wielded as a club to thwart consumer demand for innovative products, consumer demand for access to information, consumer demand for tools to exercise their lawful rights, and consumer expectations that the people and expertise will exist to service these products.

SCOTT KLUG.
RICK BOUCHER.

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