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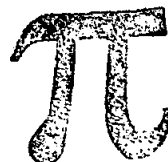
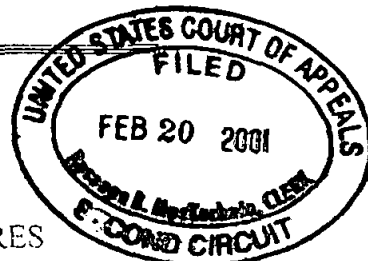
To Be Argued By:  
CHARLES S. SIMS

United States Court Of Appeals

for the

Second Circuit

UNIVERSAL CITY STUDIOS, INC., PARAMOUNT PICTURES CORPORATION, METRO-GOLDWYN-MAYER STUDIOS INC., TRISTAR PICTURES, INC., COLUMBIA PICTURES INDUSTRIES, INC., TIME WARNER ENTERTAINMENT COMPANY, L.P., DISNEY ENTERPRISES INC., TWENTIETH CENTURY FOX FILM CORPORATION,



Plaintiffs-Appellees,

-against-

ERIC CORLEY, also known as Emmanuel Goldstein  
and 2600 ENTERPRISES INC.,

RECORD COPY  
PLEASE RETURN TO ROOM  
1802

Defendants-Appellants,

-and-

SHAWN C. REIMERDES and ROMAN KAZAN,

Defendants.

-and-

UNITED STATES OF AMERICA,

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLEES

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## **FRAP 26.1 STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, and to enable judges of the Court to evaluate possible disqualification or recusal, plaintiffs-appellees — Universal City Studios, Inc.; Paramount Pictures Corporation; Metro-Goldwyn-Mayer Studios Inc.; TriStar Pictures, Inc.; Columbia Pictures Industries, Inc.; Time Warner Entertainment Company, L.P.; Disney Enterprises, Inc.; and Twentieth Century Fox Film Corporation (each a private, non-governmental party) — certify that the following are all of the corporate parents, and other publicly held companies owning 10% or more of any plaintiff-appellee's stock:

AOL Time Warner Inc.

AT&T Corp.

Bombay Hook Limited

Fox Entertainment Group, Inc.

French Street Management Inc.

Metro-Goldwyn-Mayer, Inc.

News America, Incorporated

The News Corporation Limited

Sony Corporation

Viacom, Inc.

Viacom International, Inc.

Vivendi Universal S.A.

The Walt Disney Company

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## ISSUES PRESENTED FOR REVIEW

1. Whether the post trial injunction issued by the district court pursuant to the trafficking proscriptions of the Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(2) and (b), prohibiting defendants from continuing to provide DeCSS to the public, is consistent with the First Amendment.

2. Whether the district court correctly rejected defendants' fair use defense where Congress expressly rejected providing a fair use defense to the trafficking cause of action under 17 U.S.C. § 1201(a)(2) and (b); and defendants were not themselves seeking to use or make fair use of DeCSS, and could not meet the fair use standards of 17 U.S.C. § 107.

## STATEMENT OF THE CASE

Defendants-appellants Eric Corley (a/k/a Emmanuel Goldstein) and 2600 Enterprises, Inc. (collectively "Corley")<sup>1</sup> appeal the final judgment and order of permanent injunction entered on August 17, 2000 by the Honorable Lewis A. Kaplan, after a full trial on the merits.

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<sup>1</sup> Corley is the sole shareholder of 2600 Enterprises, Inc., which was subsequently named as a defendant in the lawsuit. (A37) 2600 Enterprises, Inc. purportedly owns the website at issue, "www.2600.com," (the "Site") on which defendant Corley initially posted the DeCSS utility. Corley and 2600 Enterprises, Inc. also publish a magazine entitled "2600: The Hacker Quarterly" (the "Quarterly"), which Corley founded in 1984. See *Universal Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 308-09 (S.D.N.Y. 2000) ("*Universal*").

This case presents an important test of the trafficking proscriptions of the Digital Millennium Copyright Act of 1998 (“DMCA”), 17 U.S.C. § 1201 *et seq.* Congress enacted the DMCA, after its ratification in 1997 of the World Intellectual Property Organization (“WIPO”) Copyright Treaties, to provide new and additional protection for copyrighted works in the digital age by mandating legal protection for technological measures employed to prevent unauthorized copying and distribution of copyrighted works. The DMCA addresses the problem of instantaneous, widespread proliferation of infringing copies made possible through the Internet, and expressly authorizes injunctive relief against trafficking in, and offering to the public, devices which circumvent technological measures, such as encryption and scrambling, that copyright holders put in place to protect their works in digital form.

At trial, Plaintiffs-appellees (the “Studios”) proved each of the elements of Corley’s violation of 17 U.S.C. § 1201(a)(2) and (b).<sup>2</sup> Corley does not challenge those findings or dispute on this appeal that: (1) the Content Scramble System (“CSS”) is a technological measure that effectively controls access to, and copying

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<sup>2</sup> The trafficking proscriptions apply to devices that circumvent technological measures controlling access to a work (§ 1201(a)(2)) and devices that circumvent technological measures protecting the rights of a copyright owner (§ 1201(b)). The Second Amended Complaint alleged violation of both (A44), the Studios relied on both at trial, and the district court’s findings establish a violation of both (A2630-34). Corley’s suggestion that additional briefing would be necessary for this Court to address § 1201(b) is baseless.



of, the Studios' copyrighted works delivered in digital form on DVDs, within the meaning of the DMCA (Tr. 750:14-751:1);<sup>3</sup> (2) "DeCSS" is a device that was primarily designed to decrypt CSS-encoded DVDs and copy the decrypted movie to a computer hard drive (Tr. 228:6-9, 809:18-22, 821:21-822:17, 834:5-6, 619:12-18, 748:17-19, 896:25-897:4, 898:16-22, 1099:16-18); and (3) Corley disseminated DeCSS as a willful act of "electronic civil disobedience." (Tr. 834:18-24, 847:10-16; A2374, 361:7-21)<sup>4</sup>

Rather, Corley appeals Judge Kaplan's final judgment and permanent injunction prohibiting his trafficking in an unlawful circumvention device solely on First Amendment grounds, arguing that DeCSS, the software utility that decrypts the Studios' files, is protected speech whose dissemination to the public cannot be interfered with consistently with the First Amendment. As the Studios demonstrate

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<sup>3</sup> Throughout this brief, references to the trial transcript, which is reproduced in Volume I of the Appendix, have been denoted with the prefix "Tr." followed by the page and line number. All other citations to the Joint Appendix are represented as A###." Section 1201 and pertinent portions of legislative reports cited are reproduced in the Addendum ("Add-##").

<sup>4</sup> Corley also admitted below and also does not dispute on appeal that his conduct did not fall within either the narrow reverse engineering or encryption research exceptions to the DMCA's trafficking proscriptions. (Tr. 838:3-8) Accordingly, Corley has abandoned his arguments on the Studios' statutory claims, and Judge Kaplan's findings regarding those claims, and his rejection of Corley's entitlement to any statutory defenses under the DMCA are conclusive. *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 66 (2d Cir. 1998); *Anderson v. Branen*, 27 F.3d 29, 30 (2d Cir. 1994).

below — and as Judge Kaplan correctly found in a comprehensive and well-reasoned opinion — the trafficking proscriptions of the DMCA are aimed at conduct, not speech. Application of the DMCA to Corley’s conduct of indiscriminately disseminating an unlawful circumvention device to the public does not violate the First Amendment.

**A. The Film Studios’ Businesses, the Advent of DVD Technology, and the Content Scramble System (“CSS”).**

The Studios produce, manufacture and distribute copyrightable and copyrighted material, including, specifically, full-length motion pictures. (Tr. 401:16-402:7; 404:8-11) The Studios, either directly or through affiliates, distribute motion pictures for theatrical exhibition, for television broadcast, and on portable media such as videocassette tapes and digital versatile discs (“DVDs”) for distribution in the home video market. (Tr. 402:5-14)

DVDs are the most current technological advance in the home video market (Tr. 402:8-14), and can be played on standalone “DVD players,” or on personal computers configured with a DVD drive and additional hardware or software devices sometimes referred to as “media players.” (Tr. 25:4-11, 925:3) Because they store audiovisual information digitally, DVDs offer improved picture and sound quality over analog media such as videocassette tapes. (Tr. 240:3-12; 403:18-404:2)

When digital data is copied or transmitted, the overall quality does not degrade as in copies made from an analog source. (Tr. 404:19-22) Thus, without an effective protection system for DVDs, it would be relatively simple for pirates to make pristine, unauthorized copies. (Tr. 404:23-24) Such unauthorized copies could be stored on computer hard drives or other auxiliary storage devices such as CD-ROMs, and duplicated for unlawful sale, transfer or exchange, including by transmission over the Internet, and each of those copies would be a perfect master for further copying. (Tr. 404:23-25, 628:21-629:15)

Because of this enhanced risk of unauthorized copying and distribution of digital media, the Studios were reluctant to release valuable copyrighted films on DVDs without implementing a copy protection and access control system. (Tr. 404:16-405:5, 480:22-23) The Studios, therefore, in reliance on Congress's enactment of the anti-circumvention provisions of the DMCA, adopted such a system — the "Contents Scramble System" ("CSS") — to provide security for the copyrighted motion pictures stored on DVDs. (Tr. 406:13-407:7)

CSS includes elements of encryption and other security and authentication measures that require DVD player devices to operate with licensed software "player keys," which are necessary to descramble and intelligibly play back the DVD content. (Tr. 24:22-25:3; 209:20-210:13; 628:4-6) CSS has been licensed, by the DVD Copy Control Association, on a non-discriminatory basis to hundreds of DVD player

manufacturers around the world, and is similarly available to others. (Tr. 409:17-25, 511:9-13) Under the CSS license, authorized DVD players are designed to decrypt, unscramble and play back the DVD movie content, but not to enable users to access that content in digital form or make digital copies of the copyrighted content. (Tr. 409:20-24; 505:4-6)

**B. The Digital Millennium Copyright Act of 1998 (“DMCA”)**

One of the primary objectives of the DMCA was to bring United States copyright law in line with the WIPO Copyright treaties. The WIPO treaties imposed an obligation on member countries to “provide ‘legal protection and effective legal remedies’ against circumventing technological measures, *e.g.*, encryption and password protection, that are used by copyright owners to protect their works from piracy . . . .” *See* S. Rep. No. 105-190, at 8, 10-11 (1998) (Add-15, 17-18). Key provisions of the DMCA unambiguously prohibit trafficking in devices designed to circumvent so-called technological access control and copy control measures, like CSS. *See* NIMMER ON COPYRIGHT § 12A.03[C] at 12A-27 n.105 (2000). Specifically, Title 17 U.S.C. § 1201(a)(2) provides that:

[n]o 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 measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; 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 measure that effectively controls access to a work protected under this title.

17 U.S.C. § 1201(a)(2) (2000).<sup>5</sup> Section 1201(b)(1)(a) similarly prohibits trafficking in devices “for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner.” The anti-trafficking provisions supplement the prohibition of circumventing in § 1201(a)(1) “[i]n order to provide meaningful protection and enforcement of the copyright owner’s right to control access,” copying and distribution. S. Rep. No. 105-190 at 28 (1998) (Add-35).

**C. The Circumvention of CSS, and the Creation and Proliferation of DeCSS.**

In or around October 1999, it was widely reported that a group of computer “hackers” in Europe had identified the encryption keys for CSS. (Tr. 619:22-621:20) These hackers — including a Norwegian, Jon Johanssen, who testified at trial — created and posted on the Internet an executable software program commonly referred to as “DeCSS,” which, without authorization from the copyright owners, allowed

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<sup>5</sup> Section 1201 is reproduced in its entirety below at Add-1.

motion pictures on DVDs to be decrypted and copied to a computer hard drive. (Tr. 245:11-22; 622:21-23; 822:14-17)

DeCSS, which was designed to run on the Windows<sup>(R)</sup> operating system, accomplishes this function by mimicking the software player key that a CSS-licensed DVD player would use to decrypt and unscramble the DVD content, thereby circumventing, without authorization, the protections afforded by CSS. (Tr. 214:4-5; 250:7-251:16; 628:12-629:15; 898:19-22) DeCSS performs no functions other than decrypting a DVD movie file and then copying it to the user's computer hard drive or other designated storage device. (Tr. 246:24-248:5; 619:12-16; 896:25-897:4) Although Corley continues to assert (Br. 4) that DeCSS was created for the purpose of developing an "open-source" DVD player to run on the Linux operating system, Judge Kaplan questioned the veracity of that tale and refused to so find. *Universal* at 311 & n.79. In fact, contrary to the claim that DeCSS was created only to help the Linux development project, Johanssen admitted at trial that he *first* posted DeCSS to an Internet chat room that is an open forum for DVD enthusiasts generally, not just Linux developers (Tr. 632:9-14, 633:1-4), and that, "about a month" later, another visitor to that chat room told Johanssen that he had downloaded a movie from the Internet. (Tr. 629:16-633:4)

The significant harm posed to the Studios' investment in their copyrighted works by the dissemination of DeCSS (and, with it, the potential for widespread

dissemination over the Internet of infringing copies of their movies) is neither exaggerated nor hypothetical. The Studios proved at trial, and Judge Kaplan expressly found, that “DeCSS is a free, effective and fast means of decrypting plaintiffs’ DVDs and copying them to computer hard drives.” *Universal* at 315. Moreover, using DeCSS in conjunction with a file compression utility known as DivX “which is [also] available over the Internet for nothing, with the investment of some time and effort, permits compression of the decrypted files to sizes that readily fit on a writeable CD-ROM” or can be exchanged over the Internet via high-speed connections. *Id.*

**D. Defendants Eric Corley and 2600 Enterprises, Inc., and Their Unlawful Trafficking in DeCSS and Linking Scheme Intentionally Designed to Evade the Preliminary Injunction.**

On January 17, 2000, the Studios initiated this lawsuit for violation of the trafficking proscriptions of the DMCA against Corley — a self-described hacker journalist — and two other individuals, each of whom had posted the DeCSS executable program on their Internet websites.<sup>6</sup> (A5)

On January 20, 2000, Judge Kaplan issued a preliminary injunction prohibiting the defendants from, *inter alia*, “posting on any Internet web site, or in any other way

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<sup>6</sup> The other two defendants, Roman Kazan and Shawn Reimerdes, entered consent decrees with the Studios following the issuance of the preliminary injunction. *Universal* at 312 n.91.

manufacturing, importing, or offering to the public, providing, or otherwise trafficking in DeCSS . . . .” (A2563) After the preliminary injunction issued, the Studios also were successful in their efforts, through their trade association the Motion Picture Association of America, to discourage the posting of DeCSS on the Internet by sending out numerous cease and desist letters. *Universal* at 312; *see, e.g.*, A2284.

Following issuance of the preliminary injunction, Corley removed the DeCSS posting from the Site. However, contrary to Corley’s contention that “[t]here is no evidence that 2600’s publication of DeCSS was different or more widespread than prior or subsequent publications by others,” (Br. 5), Judge Kaplan found that Corley set out on a course of conduct purposefully designed “to frustrate plaintiffs’ recourse to the judicial system by making effective relief difficult or impossible,” *Universal* at 313, “to promote the dissemination of the program in an effort to defeat effective judicial relief,” *id.* at 341, and “to defeat the purpose of the preliminary injunction,” *id.* at 343, by setting up a veritable DeCSS clearinghouse on the Site. (A2295, A2330)

Corley solicited other hackers to post DeCSS and then forward back to the Site the website addresses (called “URLs”) for those postings. Corley even provided a convenient input box on the Site through which one could transmit to him the URL for a new posting of DeCSS so that he could link to it. (A2281)



As Judge Kaplan expressly found (*Universal* at 312-13):

[i]n what [Corley] termed an act of “electronic civil disobedience” . . . [Corley] continued to support links to other web sites purporting to offer DeCSS for download, a list which had grown to nearly five hundred by July 2000 . . . . Indeed, [the Site] carried a banner saying “Stop the MPAA” and, in reference to this lawsuit, proclaimed: “We have to face the possibility that we could be forced into submission. For that reason it’s especially important that as many of you as possible, all throughout the world, take a stand and mirror these files.”<sup>7</sup>

Corley admitted at trial that his linking scheme was intended specifically to provide the DeCSS program itself, not just to disseminate information about the utility. Indeed, Corley testified that when a URL was forwarded to the Site, he “initially verified the existence of the site” and that DeCSS was available there *before linking to it* (Tr. 851:20-852:12):

THE COURT: And it was your practice to verify the existence of the proposed mirrors before you linked to them, when you put them on your mirror list, right?

CORLEY: That’s correct.

THE COURT: So the means of knowing whether the link that you posted to your mirror list took someone who clicked on that hyperlink to a page containing a whole bunch of content, some of it relating to DeCSS and others relating to God only knows what, as compared to taking you directly to the source code for DeCSS was entirely in your hands, true?

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<sup>7</sup> Corley’s plea for others to “mirror these files” asked them to copy them onto a website of their own. (Tr. 808:17-19)

CORLEY: If we had spent more time on it, we could have refined it so it took you directly to the actual [DeCSS] files, yes . . . What we did was we took what they gave us and looked at that and said, does this go to DeCSS . . . and if it did we just put it in . . .

Yet, despite this startling trial admission, Corley (Br. 5) and his *amici* still attempt inexplicably to characterize his intentional, knowingly unlawful conduct, whose very purpose was to provide the DeCSS utility to the public, as “part of the coverage of the ongoing political and legal debate about copyright in the digital age.”<sup>8</sup>

**E. The District Court’s Opinion and Injunction.**

After a six-day trial, Judge Kaplan permanently enjoined Corley from trafficking in DeCSS, finding that: (1) Corley had “clearly violated [the trafficking provision of the DMCA] by posting DeCSS to [the Site],” *Universal* at 319; (2) Corley’s conduct was not excusable under the reverse engineering (17 U.S.C. § 1201(f)), encryption research (§ 1201(g)(4)), or security testing (§ 1201(j)) exemptions to the DMCA, *id.* at 319-22; and (3) Corley’s “statutory fair use argument . . . [was] entirely without merit.” *Id.* at 322-24. Judge Kaplan also held that Corley’s First Amendment arguments failed because, *inter alia*, the trafficking proscriptions

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<sup>8</sup> Judge Kaplan also expressly noted that “[n]ot surprisingly, [Corley’s magazine] has included articles on such topics as how to steal an Internet domain name, access other people’s e-mail, intercept cellular phone calls, and break into the computer systems at Costco stores . . . and Federal Express.” *Universal* at 308-09 (internal citations omitted).

of the DMCA are content-neutral regulations — and are, therefore, subject to no more than intermediate scrutiny under *United States v. O'Brien*, 391 U.S. 367 (1968) — which have

nothing to do with suppressing particular ideas of computer programmers and everything to do with functionality — with preventing people from circumventing technological access control measures — just as laws prohibiting the possession of burglar tools have nothing to do with preventing people from expressing themselves by accumulating what to them may be attractive assortments of implements and everything to do with preventing burglaries.

*Universal* at 329; *see also id.* at 328 n.191. Judge Kaplan also held that Corley’s intentional linking scheme constituted “offer[ing], provid[ing] or otherwise traffick[ing] in DeCSS” within the meaning of § 1201, because

[Corley] urged others to post DeCSS in an effort to disseminate DeCSS and to inform [Corley] that they were doing so. [Corley] then linked [the Site] to those “mirror” sites, after first checking to ensure that the mirror sites in fact were posting DeCSS or something that looked like it, and proclaimed on [the Site] that DeCSS could be had by clicking on the hyperlinks on [the Site].

*Universal* at 325. As Judge Kaplan recognized and held, under the circumstances, Corley’s linking scheme was tantamount to, and indistinguishable from, the actual

posting of the DeCSS utility on the Site, from which he already had been enjoined. *Universal* at 324.

### SUMMARY OF ARGUMENT

Judge Kaplan’s final judgment was correct, and should be affirmed in its entirety by this Court. The trafficking proscriptions of the DMCA aim at conduct and are not content-based, and thus are subject at most to intermediate scrutiny. Even assuming that Corley’s distribution of a decryption device implicates any expressive interest at all — which is doubtful, since the provision of decryption tools embodied in hardware would not warrant First Amendment review and no different result should obtain because such tools may also be embodied in software, *see United States v. Mendelsohn*, 896 F.2d 1183, 1185 (9th Cir. 1990) — Congress’s purpose was unrelated to the suppression of speech and neither aims at speech, nor at particular viewpoints or content. The statutory text reveals, and the legislative history confirms, that Congress sought to regulate conduct, the provision of the means for copyright infringement, by analogy to statutes barring the provision of burglary tools.

The cases leading to *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), on which Corley relies, are inapposite, as those cases involve content-based laws aimed at speech. Moreover, intermediate review was selected not because Corley’s purported speech was “functional” and entitled to any lesser protection, but in light of the fact that the DMCA’s trafficking proscriptions are aimed at conduct, not speech, and are

not content-based. Judge Kaplan did not afford intermediate scrutiny on any finding that the alleged speech at issue was less than “fully protected.” Corley’s suggestion otherwise is factually and legally incorrect.

The trafficking proscriptions and the injunction easily pass intermediate review. Corley does not dispute that an important governmental interest — protecting digital copyrighted works from enhanced risks of piracy — underlies the trafficking proscriptions, and absent the proscriptions, that interest would be advanced far less effectively. The statute and injunction are congruent to the benefits afforded and support that interest and the further interest of complying with the WIPO treaties requiring circumvention legislation, without “significantly restricting a substantial quantity of speech.” *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 216 (1997) (“**Turner II**”). In view of Corley’s attempts to evade the preliminary injunction and his sustained, knowing provision of DeCSS to the public, the injunction against his provision of DeCSS properly encompassed his public provision of DeCSS by *any* means.

Finally, the injunction does not “unconstitutionally eliminate fair use,” and the fair use doctrine provides Corley with no defense against the injunction. Congress rejected any fair use defense to the trafficking proscriptions; Corley could not prevail on such a defense in any event; and Corley’s submission that the trafficking proscriptions eliminate or even significantly impair fair use is factually preposterous.

The First Amendment is not violated by the fact that fair use of films, or plays, or artworks, is necessarily constrained by copyright owners' decisions about how, when, and to what extent to make their works publicly available, and there is today a far greater scope for fair use of films, and of films on DVDs, than ever existed in the pre-VCR era.

## ARGUMENT<sup>9</sup>

### I. APPLICATION OF THE TRAFFICKING PROSCRIPTIONS OF THE DMCA TO CORLEY'S CONDUCT IS SUBJECT, AT MOST, TO INTERMEDIATE SCRUTINY.

Judge Kaplan correctly held that none of the reasons justifying strict scrutiny apply here, as the trafficking prohibitions of the DMCA are aimed at conduct and are not content-based. This Court should affirm this holding because, here, the DMCA was applied properly to Corley's *conduct* and, accordingly, is subject at most to intermediate scrutiny.

Because Corley asserts that his expressive interests are burdened because DeCSS constitutes, in itself, protected speech, this Court must “decide at the outset the [appropriate] level of scrutiny”: “not every interference with speech triggers the same degree of scrutiny under the First Amendment.” *Turner Broad. Sys., Inc. v.*

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<sup>9</sup> In view of his contention that his First Amendment rights are infringed, Corley is correct that he is entitled to an independent appellate review of the record bearing on the ultimate First Amendment issue. He is wrong in suggesting that standard to be identical to *de novo* review, or that it applies to the appeal as a whole. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 n.31 (1984) (“There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard . . . and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the ‘entire’ record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a ‘*de novo*’ review . . . .”); *Veilleux v. National Broad. Co.*, 206 F.3d 92, 97 (1st Cir. 2000) (same).

*FCC*, 512 U.S. 622, 637 (1994) (“**Turner I**”). At one end of the spectrum, in order to prevent the government from suppressing unpopular ideas or disfavored views, courts subject to strict scrutiny content-based laws that attempt to “stifle[] speech on account of its message.” See, e.g., *United States v. Playboy Entm’t Group, Inc.*, 120 S. Ct. 1878, 1880 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Where, as here, a law which is aimed at conduct is asserted to have impacted speech, no more than an intermediate level of review applies. E.g., *O’Brien*, 391 U.S. at 377 (law against burning draft cards applied to expressive protest); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (ban on sleeping on the Mall applied to homeless protest); *United States v. Albertini*, 472 U.S. 675 (1985) (exclusion order applied to protestor on military base). Intermediate review is also applied to laws that are aimed at expressive activity or the media, but which are not content or viewpoint based and are justified by reasons other than the impact of speech. E.g., *Turner I*, 512 U.S. at 641-652, 662 and *Turner II*, 520 U.S. 180 (must-carry regulations, justified by need to increase multiplicity of voices and to increase competitiveness of marketplace); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (speech volume limitations).<sup>10</sup>

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<sup>10</sup> See also *Hill v. Colorado*, 120 S. Ct. 2480, 2491 (2000) (time, place, and  
(continued...))



Moreover, no scrutiny is required when laws aimed at conduct are applied to non-expressive conduct. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (“generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news”); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704, 706 (1986) (intermediate review is required only when “it was conduct with a significant expressive element that drew the legal remedy in the first place”).

The Studios argued below that this case was governed by *Arcara* and *Cohen*, and Judge Kaplan adopted a similar analysis in his decision granting the preliminary injunction (although he concluded otherwise in his final Opinion).<sup>11</sup> There is substantial doubt that public distribution of DeCSS is an expressive act any more than unauthorized provision of a password protecting a work (which Congress proscribed, *see* pp.30-31 *infra*) would be. Because enforcement of the trafficking proscriptions against Corley plainly satisfies *O’Brien*, however, the Court need not decide whether

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<sup>10</sup> (...continued)

manner regulations for protests near health care facilities); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 536-537 (1987) (restriction on use of “Olympic” designation); and *Procunier v. Martinez*, 416 U.S. 396, 410-14 (1974) (limitations on prisoner mail), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989).

<sup>11</sup> Compare A2570-71 with *Universal* at 326-27.

no scrutiny is required as in *Arcara* and *Cohen* — that is, whether Corley’s public distribution of DeCSS implicates no legitimate speech interests.

If the Court does address the issue, the question would be not whether computer code *can* be sufficiently expressive to warrant First Amendment protection,<sup>12</sup> but, as Judge Kaplan noted, whether application of the trafficking proscription to Corley’s distribution of DeCSS on the Site implicates the First Amendment. The testimony was virtually unanimous that DeCSS is simply a tool for decrypting DVDs<sup>13</sup> — meaning, the Studios submit, that it has no expressive content itself, and should be subject to the same analysis as would be accorded a key, a password, or a “virtual machine.” *See Universal* at 219 n.30 (citing authorities).<sup>14</sup>

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<sup>12</sup> *See Junger v. Daley*, 209 F.3d 481 (6th Cir. 2000) (reversing district court decision that encryption export regulations presented no First Amendment issue, and suggesting that intermediate scrutiny would apply if plaintiff had standing to challenge revised regulations); *Bernstein v. United States Dep’t of Justice*, 176 F.3d 1132, 1141 (9th Cir.) (holding that encryption software in source code form can be constitutionally protected expression, but expressing no opinion with respect to object code), *reh’g en banc granted, op. withdrawn*, 192 F.3d 1308 (9th Cir. 1999).

<sup>13</sup> Tr. 25:15-19 (Shamos), 228:6-9 (Stevenson), 245:3-246:1, 259:6-9 (Schumann), 619:12-18 (Johannsen), 748:17-19 (Felton), 809:18-22, 821:21-822:17, 834:5-6 (Corley), 896:25-897:4, 898:16-22 (Ramadge), 1099:16-18 (Appel); A726, 33:18-21 (Hunt Dep.).

<sup>14</sup> *See also* Katherine A. Moerke, *Free Speech to a Machine? Encryption Software Source Code Is Not Constitutionally Protected “Speech” Under the First Amendment*, 84 MINN. L. REV. 1007 (2000). Contradicting arguments they (and Corley) press here, Professor Pamela Samuelson, co-author of the ACLU *amicus* brief, and Professor J.H. Reichman, also an *amicus* here, have previously written  
(continued...)

In comparable circumstances, in *United States v. Mendelsohn*, 896 F.2d 1183, 1185 (9th Cir. 1990), the Ninth Circuit held that a particular computer program was a “device” prohibited by a law barring interstate transportation of gambling paraphernalia, and rejected a First Amendment challenge because the software

furnished computerized directions for functional use in an illegal activity . . . . Although a computer program under other circumstances might warrant first amendment protection [this one] does not [as it is] too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection.

Corley’s unauthorized provision to the public of burglary tools, a password, or an automobile key would not implicate the First Amendment, and no different analysis should apply merely because the decrypting technology Corley provided happens to have been configured as software; indeed, Congress prohibited trafficking in

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<sup>14</sup> (...continued)

while “traditional literary works” are “valued because of their expression . . . [p]rograms have almost no value to users as texts. Rather, their value lies in behavior,” and conceded that “programs are, in fact, machines” that “could as easily be implemented in hardware as in software,” and that programs “exist to make computers perform tasks . . . Traditional literary works, such as books, do not behave. Programs, like other machines, do.” Pamela Samuelson, J.H. Reichman, et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2315-16, 2319-20 (1994). Similarly, Professor Dan L. Burk, one of the 46 *amici* law professors, has observed that “congressional restriction of the function of software does not offend the First Amendment, even if it constrains the expression of values embedded in the artifact.” Burk, *Patenting Speech*, 79 TEX. L. REV. 99, 116 (2000). Any functional device is likely to have some expressive elements, but if such elements brought regulation of the devices under First Amendment scrutiny, “then it is difficult to see where the confines of the label ‘speech’ will be found.” *Id.* at 112.

decryption devices whether configured as hardware or software and, accordingly, this Court should reach the same result as the Ninth Circuit did in *Mendelsohn*. See Conference Committee Report, H. R. Rep. No. 105-796 at 68 (1998) (Add-53) (“copy control technologies may be rendered ineffective either by redesign of video recorders or by intervention of ‘black box’ devices or software ‘hacks’ . . . the conferees believe and intend that the term ‘technology’ should be read to include the software ‘hacks’ of this type and that such ‘hacks’ are equally prohibited by the general circumvention provision”).

**A. The DMCA Is a Generally Applicable Regulation of Conduct, Not Speech.**

As the Supreme Court repeatedly has held since *United States v. O’Brien*, 391 U.S. 367, 377 (1968), the enforcement of a law aimed at conduct is generally subjected, at most, to intermediate scrutiny. Such laws “pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.” *Turner I*, 512 U.S. at 642. “The distinction between regulating speech and regulating conduct that has expressive components is fundamental,” this Court held in *United States v. Weslin*, 156 F.3d 292, 297 (2d Cir. 1998), *cert. denied*, 525 U.S. 1071 (1999) (citations omitted):

It is why government can validly prohibit a range of activities ranging from secondary boycotts . . . through public nudity . . . to political assassinations . . . It would be wrong to say that those activities are not

or cannot be forms of expression. But the fact that they have expressive aspects does not exempt them from governmental prohibition.

Intermediate scrutiny does not presume that the speech at issue is of lesser value, or less than “fully protected.” To the contrary, courts apply intermediate scrutiny on the assumption (or determination) that the speech at issue is fully protected. The Court in *O’Brien* assumed that “the alleged communicative element in O’Brien’s conduct is sufficient to bring into play the First Amendment,” *id.* at 376, but held, nevertheless, that intermediate scrutiny was appropriate because “the law punished him for the ‘noncommunicative impact of his conduct, and for nothing else.’” *See also Albertini, supra; City of Erie v. Pap’s A.M.*, 529 U.S. 277, 291 (2000) (plurality opinion) (quoting *O’Brien*, 391 U.S. at 382).

Distilled to its essence, Corley’s argument for strict scrutiny stems from his contention that *all* computer software is “speech” deserving of the highest order of First Amendment protection, regardless of the character of the statute regulating or even incidentally impacting it. But even assuming *arguendo* that Corley’s provision of DeCSS has a “significant expressive element” because it is a software tool or was “published” on a website, no more than intermediate review is required because application of the DMCA in this case involves simply the enforcement of a law regulating conduct, and a defense by a party that his expression has been thereby infringed. *See, e.g., City of Erie, supra; Albertini, supra; Clark, supra.*

The DMCA’s trafficking proscriptions are generally applicable conduct regulations and reflect Congress’s concern with conduct, not speech. They do not set out to regulate speech, and *a fortiori* do not single out particular categories of speech or viewpoint. Contrary to the assumption made by Corley and his *amici* — who contend without authority or justification that the trafficking proscriptions are subject to strict scrutiny — the trafficking proscriptions are conduct regulations, like the statutes upheld in *O’Brien*, *Albertini*, *CCNV*, and *City of Erie*, and are significantly less problematic than the statute at issue in *Turner I* and *Turner II*, which was a direct regulation of the media, yet, nonetheless, was subjected only to intermediate review because it was justified by reasons unrelated to the communicative impact of the speech affected. *See Turner I*, 512 U.S. at 642.

Unlike the statutes challenged in the cases on which Corley and his *amici* rely,<sup>15</sup> which drew strict scrutiny because they directly prohibited or restricted “communications” or “disclosures” or other speech, the DMCA’s trafficking proscriptions are aimed at “products” and “devices” that circumvent technological

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<sup>15</sup> *See, e.g., Reno v. ACLU*, 521 U.S. 844, 859-60 (1997) (criminalizing the knowing transmission of defined “comment[s], request[s], suggestion[s], proposal[s], image[s], or other communication[s]”); *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (unlawful to “print, publish, or broadcast . . . in any instrument of mass communication” names of rape victims); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 120-23 (1989) (criminalizing “indecent communication for commercial purposes”); *Blount v. Rizzi*, 400 U.S. 410, 419 (1971) (authorizing Postmaster to return allegedly obscene mail).

measures protecting the Studio's digital copyrighted works. Although framed with sufficient generality to encompass such devices whether embodied in hardware or software, the statutory text restricts only the *conduct* of publicly distributing tools that accomplish the circumvention that Congress sought to deter. In comparable circumstances, courts have upheld anti-trafficking statutes like 18 U.S.C. § 2512, which bars the distribution of "wire, oral or electronic communication intercepting devices," even though such devices arguably may have lawful uses that may further speech interests. *See, e.g., United States v. Spy Factory*, 951 F. Supp. 450, 474-75 (S.D.N.Y. 1997) (Sotomayor, J.); *Mendelsohn*, 896 F.2d at 1185-86.

The DMCA's legislative history confirms that Congress sought to regulate conduct, the provision of decryption devices, using the express analogy of laws barring the provision of burglary tools. *See, e.g., S. Rep. No. 105-190*, at 11 (1998) (Add-18).<sup>16</sup>

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<sup>16</sup> *See also* Staff of House Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, (Comm. Print 1998), at 8-9 (Add-67) ("While this legislation is aimed primarily at 'black boxes' that have virtually no legitimate uses, trafficking in any product or service that meets one or more of the three points in this test could lead to liability. . . . The *Sony* test of 'capab[ility] of substantial non-infringing uses,' while still operative in cases claiming contributory infringement of copyright, is not part of this legislation . . ."); Conference Committee Report, H.R. Rep. No. 105-796, at 63-65 (1998) (Add-48-50) (noting that the "black box" or "anti-circumvention" provisions were enacted to comply with the WIPO obligation to provide "adequate legal protection and effective legal remedies against the (continued...)");

Congress's purpose, revealed with indisputable clarity, was to *facilitate* the wider distribution of creative speech, not to eliminate or reduce harm from particular viewpoints, messages, or ideas. The trafficking proscriptions were enacted to comply with the nation's obligation, under the WIPO Copyright Treaties, to "provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights," and thereby to provide "the legal platform for launching the global digital on-line marketplace for copyrighted works." S. Rep. No. 105-190, at 2, 5 (1998) (Add-9, 12).

Concerned that copyright owners were hesitating "to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy" (*id.* at 8) (Add-15), Congress sought (*id.* at 11) (Add-18) to

encourage technological solutions, in general, by enforcing private parties' use of technological protection measures with legal sanctions for . . . producing and distributing products or providing services that are aimed at circumventing technological protection measures that effectively protect copyrighted works. For example, if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act. This is roughly

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<sup>16</sup> (...continued)

circumvention of effective technological measures that are used by authors in connection with the exercise of their rights").



analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.

Legislation prohibiting circumvention devices is not unprecedented. The Copyright Act in section 1002(c) already protects sound recordings and musical works by prohibiting devices which circumvent any program or circuit that implements a serial copy management system. . . . The Communications Act in section 605(e)(4) prohibits devices that are ‘primarily of assistance in the unauthorized decryption of satellite programming . . . .’<sup>17</sup>

Corley’s attack on the trafficking proscriptions as a violation of free speech is perverse, because the DMCA was enacted to *increase* the amount and variety of digital speech available to the public, not to suppress speech or speakers.<sup>18</sup> Even assuming *arguendo* that any speech interests of Corley are implicated at all, “[w]here constitutionally protected interests lie on both sides of the legal equation[,] . . . there is no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’” *Nixon v. Shrink Missouri Gov’t PAC*, 528

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<sup>17</sup> Congress’s reference to “passwords” underlines the irrelevance of *Chicago Lock v. Fanberg*, 676 F.2d 400 (9th Cir. 1982), on which Corley relies (Br. 24). *Chicago Lock* held only that California common law imposed no confidentiality duties on locksmiths, and said nothing about whether such duties might have been imposed.

<sup>18</sup> See H.R. Rep. No. 105-551, pt. 1, at 9-10 (1998) (Add-80-81). The Register of Copyrights recently agreed, in the rulemaking mandated by Congress concerning § 1201(a)(1), that the DMCA was enacted to enable a much wider and much earlier dissemination of creative works than would occur if content owners could not protect their works from near-instantaneous worldwide digital dissemination, and concluded that the DMCA is serving that purpose. 65 Fed. Reg. 64556, 64568 n.13 (Oct. 27, 2000) (Add-122).

U.S. 377, 400 (2000) (Breyer, J., concurring); *see also, e.g., Turner I*, 512 U.S. at 647 (even where statute assisted some speakers at expense of other speakers, only intermediate scrutiny was warranted because the statutory purpose was to “guarantee the survival of a medium that has become a vital part of the Nation’s communication system”).

**B. The DMCA’s Trafficking Proscriptions Are Not Content-Based and Do Not Single Out Speech or the Media for Differential Treatment.**

The trafficking proscriptions on conduct are not content- or viewpoint-based, and leave Corley and his supporters entirely free to criticize the DMCA, Congress, the judiciary, or Hollywood. Like the law barring newspapers’ publication of discriminatory help-wanted ads upheld in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 388 (1973), or laws barring breaking and entering into bookstores or libraries without permission, their justification lies in the “noncommunicative impact” of the regulated activity. *O’Brien*, 391 U.S. at 382. The trafficking proscriptions further legitimate and substantial interests in treaty compliance and preserving the incentives created by copyright protection to create and disseminate original works. Any burden on the exchange of ideas and information is incidental to, and a necessary byproduct of, the government’s pursuit of “a legitimate regulatory goal” unrelated to the suppression of speech or the content of the speaker’s message. *Turner I*, 512 U.S. at 641.

“[T]he principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” *Turner I*, 512 U.S. at 642 (internal quotation marks and citation omitted). The “purpose, or justification” of the law is, thus, the touchstone in ascertaining content neutrality. *Id.* “Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.” *Ward*, 491 U.S. at 791.

The text and history of the DMCA’s trafficking proscriptions do not single out a particular message, speaker, subject, or viewpoint for disfavored treatment, nor even single out speech. In contrast to the statute struck down in *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1885 (2000), which singled out particular content and particular speakers, the DMCA’s trafficking proscriptions apply regardless of the content, subject matter, or identity of speakers, and can be used to protect *any* film, *any* book, or *any* musical recording. Far from reflecting any effort to “suppress, disadvantage, or impose differential burdens upon speech because of its content,” *Turner I*, 512 U.S. at 642, they reflect a legislative judgment that all copyright owners should be able to protect their digital works from virtually instantaneous, unauthorized worldwide dissemination in an age when technological advances diminish the deterrent effect and remedial efficacy of the infringement cause of action. The restrictions are thus “justified without reference to the content”

of speech. *Ward*, 491 U.S. at 791; *see also Hill v. Colorado, supra; United States v. Weslin, supra.*

Corley's contention (Br. 19) that § 1201(a)(2) "plainly categorizes banned 'technologies' including computer programs, based upon their subject matter and ideas" is frivolous. The DMCA bars *trafficking* in circumvention devices (regardless of how configured) because of what they do and are suited to do, not because of their ideas; indeed, like the "black boxes," "passwords," and keys which Congress envisioned, decryption devices express no "ideas." Public provision of decryption tools is actionable regardless of purpose, just as legislatures have made it unlawful, or could, to publicly distribute wiretapping tools, burglar tools, master keys to new vehicle fleets, and combinations to identified bank vaults or safes.<sup>19</sup>

Even if application of the statute, on occasion, may prevent persons, including the news media, from providing specific strings of numbers or software devices to the

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<sup>19</sup> Seizing on narrow exemptions that certain interest groups lobbied for and obtained concerning encryption research, reverse engineering, and security testing, § 1201(f, g, and k), Corley contends (Br. 20) that the existence of those exemptions somehow triggers strict scrutiny. The law is otherwise. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994), on which Corley relies, says only that exemptions "*may* diminish the credibility of the government's rationale for restricting speech in the first place." (Emphasis added.) Here, the narrowly tailored exemptions that Congress afforded in lieu of a broader fair use defense does not at all "diminish the credibility" of the rationale for the general trafficking prohibition Congress enacted to comply with the WIPO treaty and preserve the inducement to creation and dissemination that copyright affords.

public in particular instances, that is simply a consequence of the fact that “keys” to unlock encrypted copyrighted works can be embodied not only in hardware but in software as well, and that Congress has prohibited their distribution in either form. *Cf. Pittsburgh Press, supra.*

“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.” *Cohen*, 501 U.S. at 669. *Cohen*’s holding that the First Amendment did not bar an anonymous source’s claim for damages flowing from breach of a newspaper’s promise of confidentiality demonstrates that strict scrutiny does not apply even when, in particular cases, generally applicable laws attach liability to the public disclosure of truthful, newsworthy information. *Id.* at 668-72; *see also Konigsberg v. State Bar*, 366 U.S. 36, 50-51 (1961).

*Cohen* also reflects the broader principle that “the comprehensiveness of [a] statute is a virtue, not a vice, because it is evidence against there being a discriminatory governmental motive.” *Hill*, 120 S. Ct. at 2497; *cf. Turner I*, 512 U.S. at 661 (“broad based” regulations “do not pose the same dangers of suppression and manipulation that [are] posed by . . . more narrowly targeted regulations [aimed at particular speakers]”); *Cincinnati v. Discovery Network Inc.*, 507 U.S. 410, 424-26 (1993). That reasoning is equally applicable here, on both sides of the DMCA: it protects copyright owners generally and prohibits public distribution of

circumvention devices regardless of how or by whom it might be effected, and is not confined to hackers, the media or to anti-Hollywood websites. That two-fold generality confirms that Congress was motivated not by hostility toward the dissemination of information generally or a particular category of information, but instead by the “noncommunicative impact,” *O’Brien*, 391 U.S. at 382, of the public distribution of circumvention tools.

### C. Corley’s Remaining Arguments for Strict Scrutiny Are Meritless.

Corley’s argument that strict scrutiny is required by the line of cases culminating in *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989), reversing criminal punishment of or damage awards against the press for publishing “truthful information about a matter of public significance,” is baseless.

First, unlike the DMCA’s trafficking proscriptions, the statutes involved in those cases were content-based and squarely aimed at speech.<sup>20</sup> That difference is dispositive: the Supreme Court squarely has held that a generally applicable law that does not single out expression is not governed by *Florida Star* even when in a

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<sup>20</sup> *Florida Star* reversed a damage award imposed for violating a law barring publication of the names of rape victims; *Smith v. Daily Mail Pub’g Co.*, 443 U.S. 97, 98 (1979), overturned a conviction under a law barring publication of the names of juvenile defendants “in any newspaper”; *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 830 (1978), reversed a penalty under a law making it unlawful to “divulge” information about judicial misconduct proceedings; and *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471 n.1, 487 (1975), reversed a damage award under a law prohibiting publication of name of rape victim to protect victim’s identity.

particular case it is applied to a purported media defendant and sanctions the disclosure of truthful information about a matter of public significance. *Cohen*, 501 U.S. at 668-69.

Second, even ignoring (as the cases do not) the character of the regulation and focusing instead on the consequence of its application, DeCSS is not “truthful information,” much less “truthful information about a matter of public significance,” but a piece of functional software, *accord Mendelsohn*, 896 F.2d at 1185, whose sole purpose is to do what Congress has rendered unlawful — namely, to decrypt without authorization DVDs that have been encrypted with CSS to protect the Studios’ copyrighted films from piracy.

Corley was not sued for reporting that DeCSS had been developed and that it decrypts DVDs; he was sued for providing to the public on a sustained and continuous basis, in violation of the DMCA, the actual decryption device whose distribution Congress prohibited. The DMCA does not target disclosure of information, but the distribution of unlawful circumvention devices. The case is therefore governed not by *Florida Star* but rather by the rule underlying *Pittsburgh Press*, which upheld the constitutionality of an order enforcing a law prohibiting employers from publishing, or any other person from aiding the publication of, any “notice or advertisement relating to ‘employment’ or membership which indicates any

discrimination because of . . . sex.” Rejecting the newspaper’s First Amendment challenge, the Supreme Court held that “[t]he present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication . . . . Moreover, the order is clear and sweeps no more broadly than necessary . . . .” 413 U.S. at 390 (citations omitted). As *Pittsburgh Press* makes plain, the First Amendment does not bar the proscription of speech which is itself unlawful conduct that Congress may prohibit. *See also Jews for Jesus, Inc. v. Jewish Community Relations Council, Inc.*, 968 F.2d 286, 295-96 (2d Cir. 1992) (citing various laws that “can be violated by speech or other expressive conduct” without First Amendment difficulty); *Mendelsohn*, 896 F.2d at 1185-86.

Corley’s reliance on *Florida Star* also ignores the well-settled rule that the First Amendment does not prohibit the enforcement of laws protecting intellectual property — even against a media defendant. *See Harper & Row Publishers Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (rejecting First Amendment challenge to damage award against broadcasting company that violated plaintiff’s rights of publicity); *San Francisco Arts & Athletics, supra*; *Cable/Home Communication Corp. v. Network Prods., Inc.*, 902



F.2d 829, 849 (11th Cir. 1990).<sup>21</sup>

To hold that the DMCA's trafficking proscriptions cannot be applied to software devices distributed over the Internet because any form of software is "truthful information" would turn First Amendment jurisprudence on its head, and eviscerate the conduct-targeted trafficking proscriptions.

The trafficking proscriptions are no more subject to strict scrutiny than the analogous laws, some of which were expressly cited by Congress as models for the DMCA, prohibiting the manufacture, distribution and sale of cable and satellite television "descramblers," which also defeat access control systems. *See, e.g.*, 47 U.S.C. § 553(a)(2) (2000), 47 U.S.C. § 605(e)(4) (2000), and 18 U.S.C. § 2512 (2000). *See, e.g., Cable/Home Communication Corp.*, 902 F.2d at 850 (promotion of statutorily-prohibited "descrambling devices" for subscription cable television programming, and sale of pirated computer chips to compromise the encryption of plaintiffs' transmissions, were not protected by the First Amendment; because defendants' "speech" "not only violated the copyright and communications laws, but also encouraged third parties to do so, . . . defendants-appellants have no protection within

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<sup>21</sup> *See also New York Times Co. v. United States*, 403 U.S. 713, 731-32 n.1 (1971) (White, J., concurring) ("No one denies that a newspaper can properly be enjoined from publishing the copyrighted works of another."); *Flamm v. American Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 93 (2d Cir. 1998); *cf. Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 782 n.4 (S.D.N.Y. 1990).

the First Amendment for their unlawful expression”); *California Satellite Sys. v. Seimon*, 767 F.2d 1364, 1367-68 (9th Cir. 1985) (no First Amendment right to pirate scrambled satellite broadcast signals); *Spy Factory*, *supra*.<sup>22</sup>

Corley’s argument that there is no First Amendment justification for downgrading the protection for “functional expression” (Br. 33-40) misstates what Judge Kaplan did and attempts to raise an issue not decided below or at issue here. Judge Kaplan did not “create a new category of lesser protected speech” (Br. 33) or hold that DeCSS was “unworthy of full First Amendment protection because DeCSS is written in a computer language rather than the English language (or mathematics or iambic pentameter) allowing it to ‘function’” (Br. 33). To the contrary, he *agreed* with Corley that “DeCSS is expressive” (*Universal* at 328), but concluded that because the trafficking proscriptions are aimed at conduct, and are not content-based, only intermediate review is applicable. *Universal* at 329-30.<sup>23</sup>

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<sup>22</sup> Corley’s argument that software is necessarily “fully protected speech” deserving strict scrutiny regardless of the character of the regulation is at odds with the settled application of a wide range of strict liability product warranties and other regulation to software under, *e.g.*, U.C.C. § 2-314, U.C.I.T.A. § 405, and other state laws. Unlike the expression in books and newspapers, to which such warranties and regulation cannot constitutionally be applied, *see, e.g., Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033 (9th Cir. 1991) (citing cases), courts have consistently held that software is a product subject to such warranties. *See* MILGRIM ON LICENSING, § 5.20 (2000) (citing U.C.I.T.A. and other authorities).

<sup>23</sup> Thus, the Opinion justifies the application of intermediate scrutiny before analyzing the *Junger* case, on which Corley relied, and addressing its discussion of  
(continued...)

The decision to apply intermediate scrutiny *always* reflects a decision (or assumption) that there is some impact on “speech,” and presents the question whether that impact is nonetheless permissible. *Turner I, supra; Procunier v. Martinez, supra.* As Judge Kaplan correctly recognized, it is the character of the regulation, not whether as applied it impacts “speech” in a given instance (or speech of greater or lesser value), that determines whether intermediate or strict scrutiny applies. *Universal* at 327-28. Because Judge Kaplan undertook *O’Brien* analysis on the assumption that Corley’s speech interests were at issue, and that protected speech *was* being impacted, the arguments Corley and his *amici* make concerning “functional” speech are simply not germane to any issue on appeal. *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978).

Finally, Corley’s effort to root strict scrutiny in 17 U.S.C. § 1201(c)(4) is also meritless. That subsection’s assurance that nothing in § 1201 “shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products” does not support Corley’s claimed right to provide decryption devices to the public, much less suggest the standard of review to be applied in assessing the First Amendment defense he offers. Such provisions are used by Congress to reassure bill opponents that Congress

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<sup>23</sup> (...continued)  
functionality. *Universal* at 328-30.

considered the relevant interests, and intended no violation of the First Amendment.<sup>24</sup>

No court has held that such savings clauses require any different analysis than would otherwise obtain.

## **II. THE APPLICATION OF THE TRAFFICKING PROSCRIPTIONS TO CORLEY'S CONDUCT SATISFIES INTERMEDIATE SCRUTINY.**

Intermediate scrutiny entails a two-fold inquiry. First, does the law “further[] an important or substantial governmental interest” that is “unrelated to the suppression of free expression.” Second, is the “the incidental restriction on alleged First Amendment freedoms . . . no greater than is essential to the furtherance of that interest.” *O'Brien*, 391 U.S. at 377; *United States v. Weslin*, 156 F.3d at 297. The DMCA's trafficking proscriptions and Judge Kaplan's injunction against Corley's admitted trafficking in DeCSS easily meet both requirements.

### **A. The Trafficking Proscriptions Further Significant Interests Unrelated to the Suppression of Expression.**

Corley contends (Br. 25) that the DMCA and injunction are insufficiently tailored, but accepts (Br. 22) Judge Kaplan's holding that the trafficking proscriptions further significant interests unrelated to the suppression of expression. The first part

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<sup>24</sup> *E.g.*, 2 U.S.C. § 1607 (2000) (Lobbying Disclosure Act of 1995); 18 U.S.C. § 112(d) (2000) (Act for the Protection of Foreign Officials); 42 U.S.C. § 2000bb-4 (2000) (Religious Freedom Restoration Act); 47 U.S.C. § 326 (2000) (Communications Act); Pub. L. No. 106-274, 114 Stat. 803, §§ 5, 6 (Religious Land Use and Institutionalized Persons Act of 2000).

of the *O'Brien* standard (whether the law furthers a substantial governmental interest) is, therefore, not at issue.<sup>25</sup> See *Universal* at 330 (“The anti-trafficking provision of the DMCA furthers an important governmental interest — the protection of copyrighted works stored on digital media from the vastly expanded risk of piracy in this electronic age. The substantiality of that interest is evident both from the fact that the Constitution specifically empowers Congress to provide for copyright protection and from the significance to our economy of trade in copyrighted materials.”).<sup>26</sup>

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<sup>25</sup> E.g., *United States v. Quiroz*, 22 F.3d 489, 490 (2d Cir. 1994) (“It is well established that ‘an argument not raised on appeal is deemed abandoned’”); *Mehta v. Surles*, 905 F.2d 595, 598 (2d Cir. 1990); *United States v. Babwah*, 972 F.2d 30, 34 (2d Cir. 1992).

<sup>26</sup> The pertinent portions of each legislative report amply reflect the compelling interests underlying the trafficking proscriptions, and are reproduced in the Addendum. Hearings were conducted by the Senate Judiciary’s Subcommittee on Courts and Intellectual Property, see S. Rep. No. 105-190, at 6 (Add-13) (1998); by the House Judiciary Committee’s Subcommittee on Courts and Intellectual Property, see H.R. Rep. No. 105-551, pt. 1, at 12 (Add-83) (1998); and by the House Commerce Committee’s Subcommittee on Telecommunications, Trade, and Consumer Protection, see H.R. Rep. No. 105-551, pt. 2, at 28 (Add-94) (1998). See also, e.g., 144 Cong. Rec. H10615, H10618 (Add-132) (1998) (Statement of Rep. Barney Frank) (“I want to express my satisfaction with what we worked out. As Members have mentioned, we have a tough situation here in which we want to protect intellectual property rights but not interfere with freedom of expression.”).

**B. The Injunction Against Providing DeCSS Does Not Unnecessarily Restrict Expressive Activities.**

To satisfy *O'Brien's* narrow tailoring requirement, a regulation need not be the *least* speech-restrictive means of advancing the government's interests. Rather, the requirement of narrow tailoring is satisfied "so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation," and does not "burden substantially more speech than is necessary to further" that interest. *Turner II*, 520 U.S. at 213-14; *see also id.* at 215. The standard is satisfied if the "burden . . . is congruent to the benefits it affords." *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). "The essence of narrow tailoring is 'focusing on the evils the [government] seeks to eliminate . . . [without] significantly restricting a substantial quantity of speech that does not create the same evils.'" *Turner II*, 520 U.S. at 216 (citation omitted).

The trafficking proscriptions easily meet that test. Congress's purposes plainly would be achieved "less effectively absent the regulation." The risks of widespread digital dissemination of infringing copies of digital copyrighted works are reduced if the means for circumventing the technological protections that prevent access to and copying of the unencrypted digital content on DVDs cannot be indiscriminately provided to the public. Moreover, the WIPO treaties require "legal protection and effective legal remedies," which § 1201 affords.

Indeed, as Congress expected, it took the DMCA and the technological access control measures and other protections it fosters and protects to *induce* various copyright owners to make their works available digitally.<sup>27</sup> Moreover, the trafficking proscriptions are “congruent to the benefits” they afford and do not “restrict a substantial quantity of speech” because *all* that they prohibit is the provision of actual decryption devices to the public. They do not restrict academic research, or protest against the DMCA. Most of what they were intended to reach, and do reach, is not speech at all; and if they do reach any “speech,” the trafficking proscriptions only prohibit disseminating to the public the very circumvention devices that Congress decreed may *not* be distributed. The trafficking proscriptions thus advance precisely the interest that the nations ratifying and implementing WIPO, including the United States, have sought to advance.

In comparable circumstances, in *United States v. Weslin*, this Court easily held the Federal Access to Clinic Entrances Act (“FACE”) “valid under *O’Brien*,” noting that FACE advanced the interests underlying it more effectively than would be possible without it, while leaving “anti-abortion protestors and all other persons wishing to exercise free speech rights under the First Amendment at liberty to hold signs, pass out handbills, speak conversationally, and so forth, anywhere and anytime

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<sup>27</sup> 65 Fed. Reg. 64556, 64568 n.13 (Add-122).

they choose.” 156 F.3d at 298. Corley and his allies are similarly free to criticize the DMCA or Hollywood, discuss and teach cryptography, and so forth, anywhere and anytime they choose. All that they may not do is provide to the public the particular circumvention device, DeCSS, that would defeat the access and copy controls with which the Studios have protected their works.<sup>28</sup>

As in *Pittsburgh Press*, the burden (if any) imposed by the DMCA’s trafficking proscriptions is exactly “congruent to the benefits” it affords. Indeed, the “speech” burdened by the DMCA is limited to any decryption utility that may itself not be distributed (just as in *Pittsburgh Press* the burden fell only on publishing discriminatory employment advertisements). The DMCA and Judge Kaplan’s permanent injunction prohibit precisely the conduct that Congress found would be harmful and, thus, defined as unlawful: the offering to the public of decryption devices. Throughout its range, the restriction produces the precise benefit Congress

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<sup>28</sup> Although several of Corley’s *amici* from the field of cryptography, including cryptographer Bruce Schneier, criticize the scope of the encryption research exemption of the DMCA, § 1201(g), ironically, even Mr. Schneier has voiced strong personal opposition to the public dissemination of “exploits” (*i.e.*, computer programs “that make[] use of a vulnerability to attack a system” (A1056)), like DeCSS, stating that “I believe that it is irresponsible, and possibly criminal, to distribute exploits. Reverse-engineering security systems, discovering vulnerabilities, and writing research papers about them benefits research; it makes us smarter at designing secure systems. Distributing exploits just make [sic] us more vulnerable. . . Handing computer weaponry to clueless teenagers is part of the problem.” See Bruce Schneier, *Publicizing Vulnerabilities*, *Crypto-Gram*, Feb. 15, 2000 (available at <http://www.counterpane.com/crypto-gram-0002.html>).



sought to obtain. *See Albertini, supra; Ward, supra.*<sup>29</sup>

The only case Corley cites in which a law subject to *O'Brien* review was invalidated, *Bery v. City of New York*, 97 F.3d 689, 697 (2d Cir. 1996), is inapposite, since it involves protected activity, not conduct that may be prohibited. Review of “time, place, and manner” regulations always has entailed consideration of whether such regulations “leave open ample alternative channels for communication.” *See, e.g., Clark*, 468 U.S. at 293. Accordingly, the *Bery* court, after concluding that the City’s licensing regime for street artists was effectively “a de facto bar preventing visual artists from exhibiting and selling their art in public areas in New York,” held that “[t]he sidewalks of the City must be available for appellants to reach their public audience,” and that the “City has thus failed to meet the requirement of demonstrating alternative channels for appellants’ expression.” *Bery*, 97 F.3d at 697-98. But when

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<sup>29</sup> In an elliptical footnote (at 25 n.16), Corley suggests that the standard of scrutiny applicable to the injunction is not the usual *O'Brien* standard but the marginally heightened standard (although less than strict scrutiny) applied in *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994). Compare *Schenck v. Pro-Choice Network*, 519 U.S. 357, 372-73 (1997), and *United States v. Scott*, 187 F.3d 282, 287 (2d Cir. 1999) (applying *Madsen* standard) with *Hill*, 120 S. Ct. at 2488 (applying the *O'Brien-Ward* standard, not *Madsen*, in a facial challenge to a legislative enactment). Here, because paragraphs 1(a) and 1(b) of the Final Judgment merely track Congress’s own legislative directions and, unlike the injunctions in those cases, entail no further interstitial judicial mini-legislation directed at when, how, and in what manner “speech” may be limited, only the usual *O'Brien-Ward* test is applicable, although the injunction easily passes the *Madsen* test as well. The injunctive provisions upheld in *Madsen*, *Schenck*, and *Scott* burdened significantly more speech than does the injunction here.

*O'Brien* review is aimed at conduct regulations, and speech impacts are incidental (if they exist at all), the question is less pertinent, or at least different, and the touchstone, as identified in *Turner* and *Albertini*, is simply whether the governmental interest would be advanced less effectively absent the regulation. *See Albertini*, 472 U.S. at 688-689, *see also Turner I and II, supra*.

Corley complains (Br. 25) that Judge Kaplan failed “entirely to consider the availability of alternative channels of expression for DeCSS.” However, “alternative channels” analysis does not apply where what is regulated is itself unlawful, such as the discriminatory help-wanted notices in *Pittsburgh Press*, the software program in *Mendelsohn*, and the trafficking in decryption devices here. Defendants in fraud cases, for example, may not challenge the application of fraud statutes to their speech because “alternative channels of expression” for their fraud are unavailable. In any event, the DMCA leaves untouched channels of communication for persons engaged in protest, encryption research, reverse engineering, and security testing. *See* 17 U.S.C. §§ 1201(f)(3), 1201(g)(4)(B) & 1201(j)(4). All it proscribes, and properly so, is provision of decryption devices like DeCSS to the public at large (where they would lead to great harm). *See also Albertini*, 472 U.S. at 688-89.

**C. Given Corley’s “Studied Effort to Defeat” the Preliminary Injunction, the Injunction Barring Him from Knowingly and Purposely Providing DeCSS by Linking Does Not Unnecessarily Restrict His Expressive Activities and Satisfies Intermediate Scrutiny.**

Having found that Corley violated the trafficking proscriptions and made “a studied effort to defeat the purpose of the preliminary injunction,” and that there was a “substantial likelihood of future violations absent injunctive relief,” *Universal* at 343, Judge Kaplan correctly formulated a decree to prevent and restrain further violation of the Studios’ rights. Accordingly, in paragraphs 1(a) and 1(b) of the Final Judgment (A2690), Judge Kaplan enjoined Corley from “offering to the public, providing, or otherwise trafficking in DeCSS” — by *any* means, *including* the means he had been using during the six months that the preliminary injunction was in effect (*i.e.* providing hyperlinks to DeCSS) in a flagrant challenge to the district court’s authority.

To satisfy Rule 65(d) and eliminate any contention that the prohibition against “providing” DeCSS was insufficiently specific or left Corley free to find other indirect ways of providing DeCSS to the public, Judge Kaplan, adding belt to suspenders, also expressly enjoined Corley from further distribution of DeCSS to persons accessing his site by “knowingly linking any Internet web site operated by them to any other web site containing DeCSS or knowingly maintaining any such link for the purpose of disseminating DeCSS.” (A2692, paragraph 1(c))

The core of the Studios’ position on Corley’s linking scheme was that Corley’s behavior once legal action commenced (*e.g.*, his brazen attempts to frustrate the Studios’ ability to obtain effective relief by encouraging additional DeCSS postings, and then to evade the preliminary injunction by setting up hundreds of links to DeCSS on the Site instead of keeping a “safe distance” from his enjoined conduct) was an intentional, sustained distribution of DeCSS to the public, thereby warranting further injunctive relief. That was the basis on which the permanent injunction against Corley’s linking scheme was sought and imposed. Federal courts have held consistently that a defendant’s failure to keep a “safe distance” from previously-enjoined conduct sufficiently warrants broader injunctive relief. *See, e.g., Scott*, 187 F.3d at 288-89 (“in certain situations, ‘a record of abusive conduct makes a prohibition’ permissible where it would not otherwise have been”); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 390 (5th Cir. 1977) (in fashioning equitable relief against a party “who has transgressed the governing standards, a court of equity is free to proscribe activities that, standing alone, would have been unassailable”); *Oral-B Labs., Inc. v. Mi-Lor Corp.*, 810 F.2d 20, 24 (2d Cir. 1987) (“Furthermore, a party who has once infringed a trademark may be required to suffer a position less advantageous than that of an innocent party”).<sup>30</sup>

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<sup>30</sup> *See generally* Timothy R. Cahn and Joshua R. Floum, *Applying the Safe*  
(continued...)

Contrary to the protestations of some of Corley's *amici*, see, e.g., Online News Association Br. at 13, Judge Kaplan made plain that he was not broadly holding "linking" unlawful. *Universal* at 340-41. Rather, the injunction was based soundly on the particular facts of Corley's "studied effort to defeat the purpose of the preliminary injunction" (A2684) and his admitted purpose of disseminating DeCSS. Corley's 500 links to DeCSS were not merely a by-product of an article describing a controversy, or an effort to make such an article more complete; rather, he admittedly set out to distribute DeCSS to the public, and engaged in repeated efforts to do so, providing it continuously for many months.

Barring Corley from "knowingly linking any Internet web site operated by [him] to any other web site containing DeCSS or knowingly maintaining any such link for the purpose of disseminating DeCSS" was necessary if the governmental interest underlying the trafficking proscriptions was to be served, as Judge Kaplan recognized. Unless Judge Kaplan framed the injunction to make plain to Corley that it prohibited his provision of DeCSS *by any method*, including by linking, its remaining provisions could not achieve the purpose for which Congress authorized injunctive relief.

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<sup>30</sup> (...continued)

*Distance Rule in Counterfeiting Cases: A Call for the Use of Broad Equitable Power to Prevent Black and Gray Marketeering*, 8 FORDHAM I. P., MEDIA & ENT. L.J. 487 (1998).

Corley and his *amici* ignore this history against which the permanent injunction was crafted and, misguidedly, complain that this appeal presents broad questions about the constitutional status of linking generally. But as the Supreme Court held in *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978), appellate courts “review[] judgments, not statements in opinions . . . [and that rule] has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues.” Accordingly, the focus of review here is properly on the injunction entered against Corley, not on the issues that Corley and his *amici* — by grossly overreading the permanent injunction, misreading the opinion and studiously ignoring the findings and record on which it was entered — would rather address (such as whether the district court’s “test for linking liability is inadequate” or whether it “will chill significantly more speech than the defamation standard”).<sup>31</sup> This case, after all, like *Pacifica*, is an enforcement action, not an affirmative facial challenge, much less an affirmative facial challenge to a law directed at speech. *See also Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (“particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep”).

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<sup>31</sup> See Corley Br. 30; Online News Association Br. 14.

It is also important to note that Corley’s linking is already proscribed (although not with the same unmistakable clarity) by paragraphs 1(a) and (b) of the Final Judgment. Those restrictions in the permanent injunction prohibit Corley from providing DeCSS to the public by any means. Thus, the simplest basis for upholding paragraph 1(c) — which eliminated any doubt that the injunction barred Corley from providing DeCSS in any manner whatever, including linking — is that it reaches no conduct (or speech) not already barred by paragraphs 1(a) and 1(b) and, therefore, satisfies the First Amendment if they do. Because paragraphs 1(a) and (b) survive *O’Brien* review, so too does paragraph 1(c). *See supra* n.29 and Point IIA.

Even if the *Madsen-Schenck* test were applied to the injunction, every part of it is valid, including the clarification in paragraph 1(c) that Corley’s knowing, intentional provision of DeCSS by linking is prohibited. Under *Madsen* and *Schenck*, an injunction directed at expressive activity is valid if it “burdens [no] more speech than necessary to serve a significant governmental interest.” *See Schenck*, 519 U.S. at 374; *Scott*, 187 F.3d at 287.<sup>32</sup> Enjoining Corley from knowingly providing the public with links on his Site to DeCSS “for the purpose of disseminating DeCSS”

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<sup>32</sup> For the reasons relied on in *Madsen*, 512 U.S. at 763-64 n.2, and in *Schenck*, 519 U.S. at 374 n.6, the injunction is content-neutral because it “was issued not because of the content but because of [defendants’] prior unlawful conduct.” *See Universal* at 328-329 (defendants undertook “a studied effort to defeat the purpose of the preliminary injunction”).

serves precisely the interests underlying the DMCA, which are not challenged here, and, accordingly, burdens “no more speech than necessary.”

Determining whether an injunction burdens more speech than necessary requires assessing how much speech is likely to be burdened and whether that burden is necessary in light of the circumstances presented. On the facts adduced at trial — which proved that Corley engaged in a campaign of “electronic civil disobedience” by soliciting others to copy DeCSS onto their own web sites and then return to him their URLs so that he could, after carefully verifying that those sites contained the DeCSS, create a link back to DeCSS, whose presence he had induced<sup>33</sup> — it is plain that very little, if any, “speech” of Corley’s was burdened by paragraph 1(c), and that any such burden is “necessary” within the meaning of *Madsen* and *Scott*.

No speech of Corley’s is prohibited by the restriction in paragraph 1(c) against Corley’s provision of DeCSS by linking. He evidenced no interest in linking to those sites other than to further distribute DeCSS to the public. Corley’s testimony that he did not link to the sites whose addresses were returned to him *unless* they contained DeCSS (Tr. 847:28-848:7, 851:20-852:12) indisputably confirms that his interest was limited to providing DeCSS and did not extend to republishing any non-DeCSS

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<sup>33</sup> See *supra*, at 10-12. Corley asked other hackers to publicly provide the decryption device only once he was apprehensive that the Studios would assert their rights (redoubling his efforts after the preliminary injunction). *E.g.*, A2270-93; A2619-22, 2684-86.



content on those sites. (Given his plea to hackers to copy DeCSS and practice of linking back to their sites only after he ensured that they had done so, it is fair to say that any claim that he has an interest in “sharing” the speech of others would be based on smoke and mirrors.)

That the injunction is narrowly tailored to Corley’s provision of DeCSS (by whatever means), without burdening more speech than necessary, is also confirmed by the fact that the injunction prohibits Corley from providing DeCSS by linking to sites containing it, but does not eliminate those sites or purport to reach them (unless they are acting “in concert” with him, in which case their provision of DeCSS is already prohibited by paragraphs 1(a) and 1(b)). Nor is any burden produced by “uncertainty” and resulting chilling effect; the injunction against linking makes entirely clear what Corley may not do. *Cf. Scott*, 187 F.3d at 287-88 (discussing the uncertainty problem in *Schenck* that it found not present in the order under review). Corley’s own conduct brings the *Scott* justification squarely into play and makes plain that, under the circumstances, any marginal burden on Corley’s “speech” imposed by paragraph 1(c) is no greater than necessary.<sup>34</sup>

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<sup>34</sup> While the Studios submit that the purpose and reach of the trafficking proscriptions require no more than intermediate scrutiny, the trafficking proscriptions are narrowly tailored to serve compelling governmental interests, including interests in the wider dissemination of protected speech, and would therefore survive even strict scrutiny. *See, e.g., Burson v. Freeman*, 504 U.S. 191 (1992) (upholding statute  
(continued...))

### III. THE INJUNCTION AGAINST CORLEY'S INDISCRIMINATE TRAFFICKING IN DeCSS DOES NOT UNCONSTITUTIONALLY ELIMINATE FAIR USE.

Corley's argument (Br. 41-66) that the injunction "unconstitutionally eliminates fair use" and that the anti-circumvention and trafficking proscriptions of the DMCA should be construed to avert this purported constitutional difficulty is wrong for multiple reasons. First, Congress deliberately declined to enact a fair use defense for either the circumvention (§ 1201(a)(1)) or trafficking causes of action (§ 1201(a)(2),(b)), providing, instead, an assortment of defenses and exemptions better-tailored to the statutory plan. Second, because Corley did not seek to use DeCSS himself and distributed DeCSS to the world at large without making the slightest attempt to limit distribution to persons seeking to make what he contends would be "fair use decryption," Corley cannot defend his trafficking in DeCSS on the theory that it would facilitate fair use by others.

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<sup>34</sup> (...continued)

on strict scrutiny); *Osborne v. Ohio*, 495 U.S. 103 (1990); *Austin v. Michigan St. Chamber of Commerce*, 494 U.S. 652 (1989). The means Congress chose were "precisely targeted," indeed with laser-like accuracy, at the compelling governmental interests in treaty compliance, protecting copyright incentives from the harms threatened by technological advances, and inducing reluctant copyright owners to disseminate into the marketplace in digital form their copyrighted works, while leaving the DMCA's opponents free "to express their political views." *Austin*, 494 U.S. at 660. On their face, and as applied here, the trafficking proscriptions prohibit nothing except the public distribution of the actual *means* of decryption, leaving cryptologists, academics, and everyone else free to criticize, comment, or engage in any speech *about* such means, or about anything else.

As Judge Kaplan recognized, Corley raises the purported “right to fair use” solely on the basis of third-party hypothetical uses, none of them serious, imminent or prevalent enough to justify striking down a statute whose application in most instances (preventing the “Napster-ization”<sup>35</sup> of the Studio’s copyrighted films) is constitutional. *See Universal* at 337-39. Such a third-party fair use defense to public trafficking in unlawful decryption devices, abstracted from the use of specific copyrighted works, is conceptually unintelligible, and even if it were not, Corley’s indiscriminate dissemination of DeCSS to the general public renders him ineligible for any such defense.

Further, given technological advances, there is today, under the DMCA, a far greater opportunity for fair use of the Studio’s motion pictures and the supplementary materials distributed with them on DVDs than was available either before commercial distribution of VCRs or since. The First Amendment surely does not require a fair use defense for the indiscriminate public provision of decryption devices, least of all now, while the dystopian scenarios that so alarm *amici* are nowhere near becoming reality and wholly unsupported by the record. This Court should affirm Judge Kaplan’s decision and reject Corley’s attempt at an unnecessary “saving” construction of the statute, a construction that would nullify the protection Congress afforded in

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<sup>35</sup> *See generally A&M Records, Inc. v Napster, Inc.*, No. 00-16401, 16403, 2001 WL 115033 (9th Cir. Feb. 12, 2001).

the DMCA.

**A. Congress Expressly Rejected a Fair Use Defense to the Ban on Providing Circumvention Devices to the Public.**

Rejecting a general fair use defense for § 1201(a) and (b), which Corley’s attorneys and many of his *amici* urged Congress to enact, Congress instead provided seven narrower exemptions and defenses where it was possible to do so consistent with the overall purpose of the anti-circumvention and anti-trafficking statutory mandates. *See* 17 U.S.C. § 1201(d)-(j) (2000).<sup>36</sup> This statutory scheme reflects a conscientious effort to balance the interests of copyright holders and others and to articulate this balance in terms appropriate to the distinctive purpose of the DMCA. Corley asserted several of these statutory exceptions, and Judge Kaplan’s rejection of these defenses by Corley is unchallenged. *See Universal* at 319-21. But § 1201 conspicuously does not provide a “fair use” defense to trafficking in circumvention devices.<sup>37</sup>

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<sup>36</sup> The Register of Copyright also recently noted in the Final Rule issued in the rulemaking proceeding required by § 1201(a)(1)(C), that “fair use, as codified in 17 U.S.C. § 107, is not a defense to the cause of action created by the anti-circumvention prohibition of section 1201.” Recommendation of the Register of Copyrights, 65 Fed. Reg. 64556, 64561 (Add-115).

<sup>37</sup> Even commentators critical of aspects of the DMCA have recognized that a fair use defense is simply not part of the statutory plan. *See, e.g.,* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 723 (2000).

The legislative history confirms that Congress intended that the DMCA should not detract from the fair use defense already available to copyright *infringement* actions, and equally that “fair use principles certainly should not be extended beyond their current formulation.” H.R. Rep. No. 105-551, pt. 2, at 25 (1998) (Add-91); *see also* S. Rep. No. 105-190, at 23-24, 30 (1998) (Add-30-31, 37). Advocates of a general fair use defense to a violation of § 1201, including representatives of *amici*, presented their concerns to Congress,<sup>38</sup> and the House Commerce Committee was particularly “concerned that marketplace realities” could lead to “less access, rather than more, to copyrighted materials,” and in a worst-case scenario “the permanent encryption of all electronic copies.” H.R. Rep. No., pt. 2, at 36 (Add-96). Indeed, an

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<sup>38</sup> See, e.g., *Testimony Regarding Implementation of the December 1996 WIPO Copyright and Phonograms Treaties: Hearing on H.R. 2281 Before the House Comm. on Commerce*, 105th Cong. (1998) (statement of Robert Oakley), available at <http://com-notes.house.gov>. (proposing, on behalf of American Library Association and others, that § 1201 should include a subsection stating that “[a]ll rights, limitations and defenses available under this title, including fair use, shall be applicable to actions arising under this chapter”); *Testimony Regarding Comprehensive Implementation of the December 1996 WIPO Copyright and Phonograph Treaties: Hearing on H.R. 2281 Before the House Comm. on the Judiciary*, 105th Cong. (1997) (statement of Gary J. Shapiro), available at <http://www.house.gov/judiciary/4008.htm> (arguing, on behalf of consumer electronics manufacturers, that Section 1201 is defective because it does not “allow ‘fair use’ to be invoked as a defense for a product that enables fair uses by consumers”); *id.* (statement of Chris Byrne), available at <http://www.house.gov/judiciary/4023.htm> (advocating revision of DMCA to incorporate *Sony* standard and link “liability for circumventing a copy protection system to an intent to infringe” and “enable users to access and copy material for fair use”).

amendment “legislating an equivalent fair use defense for the new right to control access” was proposed. H.R. Rep. No. 105-551, pt. 2, Additional Views of Scott Klug and Rick Boucher, at 85-86 (Add-106-07).

But, as the amendment’s advocates acknowledge, *id.*, Congress *rejected* the pleas of 62 law professors to forego the trafficking proscriptions, H.R. Rep. No. 105-551, pt. 2, at 24 (Add-90), and also declined to enact a fair use defense. Instead, Congress adopted, *inter alia*, a two-year moratorium on circumvention liability under § 1201(a)(1)(A) — *but, importantly, not on trafficking liability* — and narrowly tailored exemptions from trafficking liability that would not destroy the village in order to save it. *See* 17 U.S.C. § 1201(a)(1)(A-D), § 1201(f-j).

Notably, the DMCA makes a firm distinction between circumvention liability — for which Congress provided in § 1201(a)(1) the possibility of regulatory exemption of classes of works in furtherance of the interests that underlie the fair use defense to infringement actions — and trafficking liability under §§ 1201(a)(2) and (b), as to which no such exemption was afforded or conceptually possible. Indeed, as Congress recognized, public provision of decryption devices would eliminate precisely the security for technologically protected copyrighted works that Congress sought to foster. *See* 17 U.S.C. § 1201(a)(1)(E); Staff of House Comm. on the Judiciary, 105th Cong., 2d Sess., Section-by-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, (Comm. Print

1998) (“Committee Print”), at 8 (Add-66).

Congress’s rejection of a general fair use defense to trafficking liability is reflected in three narrow exemptions to § 1201(a)(2) for persons who develop and provide circumvention technologies for the limited purposes of reverse engineering, encryption research, and security testing. *See* 17 U.S.C. § 1201(f)(2), (f)(3), (g)(4), (j)(4). Congress was mindful of potentially legitimate needs to circumvent technological protections limiting access and copying, and chose to craft exemptions narrowly tailored to those needs so as to advance the DMCA’s goal of inducing copyright owners to make their works available in digital form. *See* Committee Print at 15 (Add-73-74) (Section 1201(f)(3) accommodates sharing of circumvention tools to facilitate interoperability of newly-developed computer programs, but “[r]ecognizing . . . that making circumvention information or tools generally available would undermine the objectives of this Act, *the provision imposes strict limitations.*”).

The Supreme Court consistently has deferred to Congress’s ability to balance competing interests when technological innovations threaten to diminish the incentives fostered by the Copyright Act. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority

and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”). Congress deliberately omitted a fair use defense for trafficking in circumvention devices, and the targeted exemptions that it did craft would be rendered superfluous — in violation of basic rules of statutory construction — by the fair use defense Corley and his *amici* ask the Court to enact. *See, e.g., Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (statutory exceptions are construed narrowly to preserve the primary operation of the statute); *Patsy v. Board of Regents*, 457 U.S. 496, 507-12 (1982) (rejecting proposed construction that would render other statutory provisions superfluous); *United States v. Tappin*, 205 F.3d 536, 540 (2d Cir.) (same), *cert. denied*, 121 S. Ct. 260 (2000). The statutory text, structure, and legislative history all confirm that the reference to “fair use” in § 1201(c)(1) is to keep causes of action for circumvention and trafficking, and defenses thereto, *separate* from infringement actions and defenses.

By its very nature, fair use cannot be wrenched from the infringement context and wedged into the DMCA’s statutory framework: fair use is the “use of a copyrighted work,” 17 U.S.C. § 107, permissible only under a “case-by-case analysis” of the use in relation to the work, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 n.8 (1994); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). A defendant establishes a fair use affirmative defense by proving, *Campbell*,



510 U.S. at 590, that *his use* of a particular work will be limited and unlikely to cause market harm. By contrast, the DMCA is concerned not with the copying of specific works but with the public dissemination of devices that facilitate infringement and thereby risk harm to *all* copyrighted works protected by a given technology. A fair use defense to trafficking in circumvention devices — which Congress refused to enact, despite pleas to do so by, among others, Corley’s attorneys and many of his *amici* — would render the proscription meaningless and eviscerate the technological protections against digital copying that Congress sought to foster.

**B. Even If Congress Had Not Expressly Rejected a Fair Use Defense to a Trafficking Claim, Corley Could Not Prevail on Any Such Defense and His “Overbreadth” Argument Is Equally Unavailing**

Judge Kaplan’s permanent injunction against Corley’s trafficking in DeCSS cannot be overturned on fair use grounds not only because Congress provided no such defense, but also because, by Corley’s own admission, he would not be entitled to it in any event. During the course of the proceedings below, Corley admitted that: (a) he did not own any DVDs or a DVD player; (b) he personally never used, nor sought to use, DeCSS; and (c) he never wanted or needed to decrypt any work protected with CSS. (A337-38) The only “use” Corley made of DeCSS was his sustained trafficking in the device on the Site, with no attempt to limit distribution to persons with some particularized need to use it for a non-infringing, or any other arguably

permissible purpose.<sup>39</sup>

On this record, Corley cannot possibly be entitled to rely on fair use because he personally is not making any “use” of either DVDs or DeCSS. Corley’s fair use mantra is an impermissible attempt to raise the purported fair use rights of a host of third-party, hypothetical users of DeCSS, in defiance of Congress’s decision that consideration of such purported uses — *i.e.*, the doctrine of *Sony*, 464 U.S. at 440-42 — “is not part of this legislation.” *See supra* n.16.<sup>40</sup> Federal courts routinely have rejected defendants’ attempts to assert the fair use rights (whether real or hypo-

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<sup>39</sup> Corley posted DeCSS on his web site, and solicited others to do so as well, describing it as a free DVD decoder to enable people to copy DVDs, and with an invitation to all and sundry to download it. *See* A371, A2270. Even if there were a fair use defense to assert, Corley would not succeed, given Congress’s categorical conclusion that public provision of decryption devices “would adversely affect the potential market” for copyrighted works. *See Sony*, 464 U.S. at 451; *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 927 n.13 (2d Cir. 1994).

<sup>40</sup> Corley adduced testimony from computer scientists about potential third-party scientific uses that conceivably might be facilitated by DeCSS. *See* A386-390 (testimony of Prof. Peter Ramadge) and Br. at 47-49. Such evidence cannot afford Corley a defense, however, because he did not know of these third parties or their research and made no effort to limit his distribution of DeCSS for such purposes. *See* A374. Corley’s indiscriminate dissemination of DeCSS is in sharp contrast to the narrow exemptions for distribution of circumvention devices Congress enacted in 17 U.S.C. § 1201(f), (g), and (j).

In fact, Dr. Peter Ramadge’s testimony showed that digital audiovisual content can be licensed for his research purposes, and that DeCSS is, at most, a means to obtain better quality content at a better price — *i.e.*, free. *See* A388-90. He had no knowledge of whether his corporate research sponsors approached copyright owners to obtain licenses to use digital content. A398.

thetical) of third parties to excuse their unlawful conduct. *See, e.g., Napster, Inc.*, 2001 WL 115033, at \*6-\*12 (rejecting defendant MP3 music file sharing service's argument that its users engaged in fair use); *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (rejecting defense despite argument by defendant which retransmitted copyrighted radio broadcasts over telephone lines that end listeners engaged in transformative fair use of broadcasts); *Princeton Univ. Press v. Michigan Document Servs.*, 99 F.3d 1381, 1386 & n.2 (6th Cir. 1996) (rejecting fair use defense to college campus "copy shop" operator's unauthorized copying of "coursepacks" despite assertion that "it would be fair use for the students or professors to make their own copies"), *cert. denied*, 520 U.S. 1156 (1997); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530-31 (S.D.N.Y. 1991) (same); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351-53 (S.D.N.Y. 2000) (rejecting fair use defense to website operator's unauthorized copying of copyrighted CDs despite defendant's attempt to portray service as "functional equivalent" of its subscribers' fair use).

For this same reason, this Court also should reject any attempt to argue that by impairing fair use of DVDs generally the DMCA's trafficking proscriptions are unconstitutionally overbroad (which Corley seems to have abandoned in any event,

see Br. at 52, but which some of his *amici* press).<sup>41</sup> Generally, a litigant has standing only to vindicate his own rights. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984).<sup>42</sup> Accordingly, Corley may assert hypothetical fair uses by others only if the overbreadth doctrine were applicable here. It is not. As the Supreme Court repeatedly has cautioned, overbreadth is “strong medicine” that should be applied only “with hesitation” and as a “last resort.” *Los Angeles Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999); *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick*, 413 U.S. at 613. Where statutes aimed solely at conduct — as are § 1201(a)(2) and (b), see Point IA, *supra* — are concerned, “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep,” before the statute can be invalidated. *Hill*, 120 S. Ct. at 2498; *Ferber*, 458 U.S. at 770; *Broadrick*, 413 U.S. at 615. Here, as in *United Reporting*, *Ferber*, and *Authors League of Am., Inc. v. Oman*, 790 F.2d 220, 225-26 (2d Cir. 1986) (Oakes, J., concurring), Congress’s stated, legitimate purpose in enacting, and the permissible applications of, the

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<sup>41</sup> See, e.g., ACM Committee Br. at 5.

<sup>42</sup> Naturally, if a statute is facially invalid in every conceivable application, any litigant will have standing to challenge it, *Taxpayers for Vincent*, 466 U.S. at 803 (citing cases invalidating laws requiring speakers to obtain licenses for speech, or prohibiting specific expressions based on content), but the trafficking proscriptions here have unchallengeable constitutional application to a wide range of conduct, and are not at all analogous to the statutes subject to invalidation on that ground.

DMCA's trafficking proscriptions dwarf whatever marginal applications might be imagined to impair expressive interests, and Judge Kaplan properly rejected Corley's argument that application of the DMCA to his trafficking activities is unconstitutional because of its supposed chilling effect on some theoretically permissible conduct or speech of others. *Universal* at 337-39.<sup>43</sup>

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<sup>43</sup> Among decisions rejecting overbreadth challenges in copyright-related cases, *see, e.g., Anderson v. Nidorf*, 26 F.3d 100, 104 (9th Cir. 1994), *cert. denied*, 574 U.S. 1035 (1995), and *Authors League*, 790 F.2d at 225-26 (Oakes, J., concurring) (agreeing that Copyright Act manufacturing clause, 17 U.S.C. § 601, did not violate plaintiffs' rights and that the court should "leave to another day the question whether it is unconstitutional as applied" to others). Among other recent cases rejecting overbreadth challenges to statutes aimed conduct, *see, e.g., Osborne v. Ohio*, 495 U.S. 103, 112 (1990), and *Longo v. United States Postal Serv.*, 953 F.2d 790, 797-98 (2d Cir. 1992), *vacated and remanded on other grounds*, 506 U.S. 802 (1992), *adhered to*, 983 F.2d 9 (2d Cir. 1992), *cert. denied*, 509 U.S. 904 (1993).

Finally, Corley mistakenly proposes (at 63-66) that to remedy the asserted constitutional infirmity of the DMCA this Court should construe § 1201(a)(3) to mean that "the authority of the copyright owner" to decrypt an encrypted work passes to the buyer of a copy of such a work upon sale of a DVD. Judge Kaplan rightly rejected this tortured reading as "sophistry." *See Universal* at 317 n.137. Copyright owners would not go to the trouble of encrypting their works for use with DVD players with authorized decryption keys if the mere sale of a copy entitled the buyer to decrypt the works and copy them with impunity. The authorization by the Studios has been limited to accessing DVD content via authorized equipment, and does not extend to decryption enabling the further copying and distribution of the digital (or analog) output. Both this proposed "saving construction" and the proposed judicial imposition of a "fair use" defense would eviscerate the trafficking proscriptions and eliminate the protection for which Congress enacted them.

**C. The Trafficking Proscriptions Do Not Eliminate Fair Use of Films Delivered on DVD.**

Corley and his *amici* erroneously assert that the permanent injunction, and the DMCA's trafficking proscriptions in general, sound the death knell for fair use of copyrighted works delivered on DVDs.<sup>44</sup> Contrary to those claims, however, the public now has a far greater body of commercially-released films from which to make fair use, and a greater scope for fair use of each of those films, than was ever available prior to the commercial launch of VCRs in the 1970s. In the pre-VCR era and since, the First Amendment has not been violated by the fact that the fair uses that could have been made of films always have been necessarily impacted by the Studios' decisions about how frequently, and in what cities and theaters, to release their films. The property rights that have, for example, permitted Disney to release *Snow White* only periodically and for limited times, and that permit both live stage and motion picture theaters to refuse to allow ticketholders to film or videotape plays and films, do not violate the First Amendment, and neither do the state law rights that, together with 17 U.S.C. § 202, permit purchasers of art objects or literary manuscripts (whether or not copyrighted) to keep them out of public view. The Studios are free to release their films exclusively for display in movie theaters, or not to release them at all. *See, e.g., Stewart v. Abend*, 495 U.S. 207, 228-29 (1990) ("nothing in the

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<sup>44</sup> *See, e.g.,* Corley Br. 41; Lessig and Benkler Br. 10; ACLU Br. 4-5, 14-15.

copyright statutes would prevent an author from hoarding all of his works during the term of the copyright”). Studios distributed their works for decades in this manner before the advent of DVDs, or even of videocassettes, and fair uses for film criticism, comment, teaching, scholarship, and research were as common as crabgrass.

Contrary to Corley’s assertion (Br. 41) that the permanent injunction is “unconstitutional because it eliminates fair use of DVD movies,” neither the injunction nor the DMCA “eliminate fair use” of anything, much less of any copyrighted work at issue in this action.<sup>45</sup> A movie released on DVD and in no other

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<sup>45</sup> The Register of Copyrights recently found those same “Chicken Little” alarms, which were raised by Corley’s attorneys and many of his *amici* here, completely unwarranted: “[T]here has been no evidence submitted in this rulemaking that access to works available only in a secured format is being denied or has become prohibitively difficult. Even considering the examples presented by various commentators, they merely establish that there are works that exist only in digital form. They have not established that access controls on those works have adversely impacted their ability to make noninfringing uses, or, indeed, that access controls impede their use of those works at all . . . . In the case of motion pictures on DVDs, anyone with the proper equipment can access (view) the work. If there were evidence that technological access controls were being used to lock up material in such a way that there was effectively no means for a user wanting to make a noninfringing use to get access, it could have a substantial adverse impact on users . . . . Nonetheless, that evidence would have to be balanced against an author’s right to grant access to a work. . . . [In any event, n]o such evidence has been presented . . . .” 65 Fed. Reg. at 64567 (Add-121). Indeed, rejecting the very contention pressed here as well, the Register noted that motion picture producers had been “generally unwilling to release their works in DVD format unless they are protected by access control measures,” and that “*it appears that the availability of access control measures has resulted in greater availability of these materials.*” 65 Fed. Reg. at 64568 n.13 (Add-122).

format<sup>46</sup> could be the subject of innumerable uses potentially qualifying as fair use. Its plot and characters can be imitated or spoofed; its language can be quoted; and it can be shown on a DVD player in a classroom. Further, nothing in the DMCA, for example, would prohibit taking a brief snapshot from a TV or video display, that otherwise meets the statutory fair use criteria, of the content on a DVD (which would not, to be sure, be a perfect digital copy, but that is precisely the point of the trafficking proscriptions). In short, rigorous enforcement of the anti-circumvention provisions would impair, at most, the marginal quality of the image available for certain kinds of exotic fair uses. However, § 107 of the Copyright Act does not afford a “privilege” to make perfect digital copies of DVD movies; it merely provides a defense in infringement actions for certain permissible uses.<sup>47</sup>

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<sup>46</sup> Although Corley and *amici* prophesy that “most works in a few short years will certainly be” available only in encryption-protected digital media, Benkler and Lessig Br. 10, Intellectual Property Law Professors Br. 18, Corley Br. 54, the record supports no such proposition about the present or the future. As Judge Kaplan noted, “all or substantially all motion pictures available on DVD are also on videotape.” *Universal* at 337. Even David Nimmer’s musings about a “pay-per-use” world are qualified by the admission that technological and economic factors make such a world “not inevitable” and in any event “decades” distant if it materializes at all. Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 740 (2000).

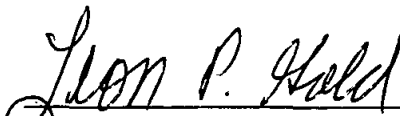
<sup>47</sup> None of the cases relied upon by *amici* Intellectual Property Law Professors supports the proposition that a “fair user” is entitled to perfect digital copies, much less that the First Amendment would be violated if Congress provided for fair use but denied access to perfect digital copies for the small portion of fair uses that involve visual quotation.



Nothing in the DMCA or the First Amendment gives courts the duty or power, in the abstract, to create a new fair use “right” to *optimal copies* of a copyright owner’s works, when Congress already has weighed the competing interests and come to a different balance. Yet, it is only in this diminished ease of access to such optimal copies — anecdotally suggested here and there in the record, with no reference to specific users or specific works — that Corley grounds his sweeping assertion that fair use is being “eliminated.” Even if his constitutional arguments were not otherwise defective, Corley’s claims about fair use should be rejected because of their sheer factual inaccuracy and his failure of proof.

### CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court in all respects.

  
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## CERTIFICATION

The undersigned attorney for appellees certifies that the foregoing brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7). The total number of words in the foregoing brief is 16,949.



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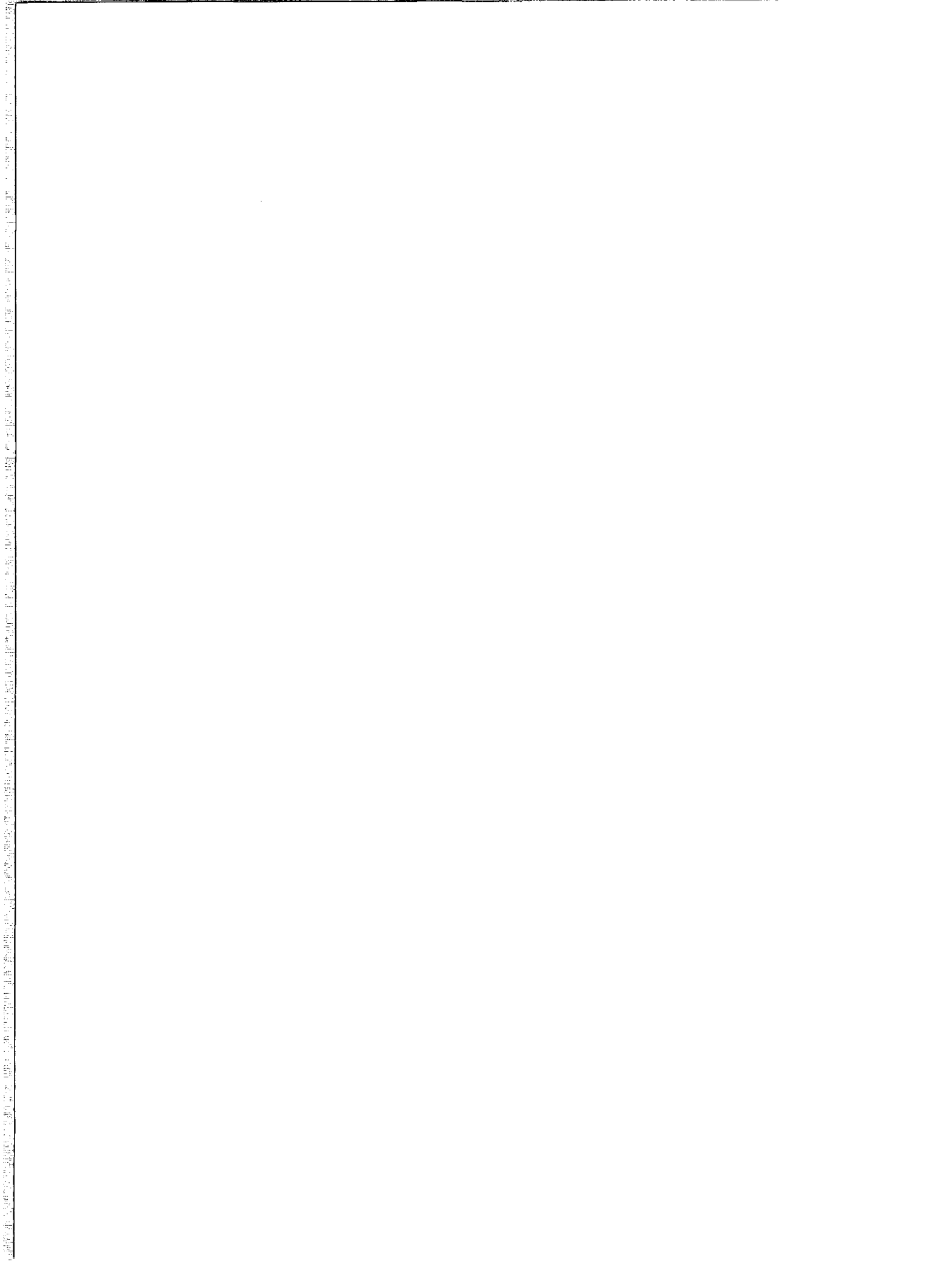
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# UNITED STATES CODE

1994 EDITION

## SUPPLEMENT V

CONTAINING THE GENERAL AND PERMANENT LAWS OF  
THE UNITED STATES, ENACTED DURING THE  
104<sup>TH</sup> AND 105<sup>TH</sup> CONGRESSES AND  
106<sup>TH</sup> CONGRESS, FIRST SESSION

Prepared and published under authority of Title 2, U.S. Code, Section 285b,  
by the Office of the Law Revision Counsel of the House of Representatives



JANUARY 4, 1995, TO JANUARY 23, 2000

VOLUME TWO

TITLE 11—BANKRUPTCY

TO

TITLE 17—COPYRIGHTS

UNITED STATES  
GOVERNMENT PRINTING OFFICE  
WASHINGTON : 2000

shall be placed in an escrow account managed by an independent administrator jointly appointed by the interested copyright parties described in section 1001(7)(A) and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to non-featured vocalists (whether or not members of the American Federation of Television and Radio Artists or any successor entity) who have performed on sound recordings distributed in the United States. 40 percent of the remaining royalty payments in the Sound Recordings Fund shall be distributed to the interested copyright parties described in section 1001(7)(C), and 60 percent of such remaining royalty payments shall be distributed to the interested copyright parties described in section 1001(7)(A).

[See main edition for text of (2); (c)]

(As amended Pub. L. 105-80, §12(a)(24), Nov. 13, 1997, 111 Stat. 1535.)

AMENDMENTS

1997—Subsec. (b)(1). Pub. L. 105-80 substituted “Federation of Television” for “Federation Television” before “and Radio Artists or any successor entity”.

§ 1007. Procedures for distributing royalty payments

(a) FILING OF CLAIMS AND NEGOTIATIONS.—

(1) FILING OF CLAIMS.—During the first 2 months of each calendar year after calendar year 1992, every interested copyright party seeking to receive royalty payments to which such party is entitled under section 1006 shall file with the Librarian of Congress a claim for payments collected during the preceding year in such form and manner as the Librarian of Congress shall prescribe by regulation.

[See main edition for text of (2)]

(b) DISTRIBUTION OF PAYMENTS IN THE ABSENCE OF A DISPUTE.—After the period established for the filing of claims under subsection (a), in each year after 1992, the Librarian of Congress shall determine whether there exists a controversy concerning the distribution of royalty payments under section 1006(c). If the Librarian of Congress determines that no such controversy exists, the Librarian of Congress shall, within 30 days after such determination, authorize the distribution of the royalty payments as set forth in the agreements regarding the distribution of royalty payments entered into pursuant to subsection (a), after deducting its reasonable administrative costs under this section.

[See main edition for text of (c)]

(As amended Pub. L. 105-80, §§9, 12(a)(25), Nov. 13, 1997, 111 Stat. 1534, 1535.)

AMENDMENTS

1997—Subsec. (a)(1). Pub. L. 105-80, §12(a)(25)(A), substituted “calendar year 1992” for “the calendar year in which this chapter takes effect”.

Subsec. (b). Pub. L. 105-80, §§9, 12(a)(25)(B), substituted “After the period established” for “Within 30 days after the period established” and “each year after 1992” for “each year after the year in which this section takes effect”.

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 801, 803, 1005, 1006 of this title.

SUBCHAPTER D—PROHIBITION ON CERTAIN INFRINGEMENT ACTIONS, REMEDIES, AND ARBITRATION

§ 1008. Prohibition on certain infringement actions

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 115 of this title; title 19 section 1337.

CHAPTER 12—COPYRIGHT PROTECTION AND MANAGEMENT SYSTEMS

- Sec. 1201. Circumvention of copyright protection systems.
- 1202. Integrity of copyright management information.
- 1203. Civil remedies.
- 1204. Criminal offenses and penalties.
- 1205. Savings clause.

§ 1201. Circumvention of copyright protection systems

(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES.—(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rule-making proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for non-profit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

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

(v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title 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 measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; 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 measure that effectively controls access to a work protected under this title.

(3) As used in this subsection—

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

(B) a technological 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 measure that effectively protects a right of a copyright owner under this title 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 measure that effectively protects a right of a copyright owner under this title 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 measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection—

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

(B) a technological measure "effectively protects a right of a copyright owner under this title" 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 this title.

(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 this title.

(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 measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

(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 this title shall not be in violation of 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 1203; and

(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203, 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 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, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES.—This section does not prohibit any lawfully authorized investigative, protective, information security, 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. For purposes of this subsection, the term “information security” means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

(f) REVERSE ENGINEERING.—(1) Notwithstanding the provisions of subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological 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 this title.

(2) Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling 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 this title.

(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 enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.

(4) For purposes of this subsection, the term “interoperability” means the ability of com-

puter 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 that subsection for a person to circumvent a technological 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 this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 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 this title 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 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 meas-

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ure for the sole purpose of that person 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 chapter, the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly 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 measures designed to protect copyrighted works; and

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

The report shall include legislative recommendations, if any.

(h) EXCEPTIONS REGARDING MINORS.—In applying subsection (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 this title; 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 that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if—

(A) the technological 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 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.

tifying 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 MEASURES.—This subsection does not apply to a technological 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.

(j) SECURITY TESTING.—

(1) DEFINITION.—For purposes of this subsection, the term “security testing” means accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network.

(2) PERMISSIBLE ACTS OF SECURITY TESTING.—Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to engage in an act of security testing, if such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 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 security testing was used solely to promote the security of the owner or operator of such computer, computer system or computer network, or shared directly with the developer of such computer, computer system, or computer network; and

(B) whether the information derived from the security testing was used or maintained in a manner that does not facilitate infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security.

(4) USE OF TECHNOLOGICAL MEANS FOR SECURITY TESTING.—Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to develop, produce, distribute or employ technological means for the sole purpose of performing the acts of security testing described in subsection (2),<sup>1</sup> provided such technological means does not otherwise violate section<sup>2</sup> (a)(2).

(k) CERTAIN ANALOG DEVICES AND CERTAIN TECHNOLOGICAL MEASURES.—

(1) CERTAIN ANALOG DEVICES.—

(A) Effective 18 months after the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in any—

(i) VHS format analog video cassette recorder unless such recorder conforms to

<sup>1</sup> So in original. Probably should be subsection “(a)(2).”

<sup>2</sup> So in original. Probably should be “subsection”.

the automatic gain control copy control technology;

(ii) 8mm format analog video cassette camcorder unless such camcorder conforms to the automatic gain control technology;

(iii) Beta format analog video cassette recorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 1,000 Beta format analog video cassette recorders sold in the United States in any one calendar year after the date of the enactment of this chapter;

(iv) 8mm format analog video cassette recorder that is not an analog video cassette camcorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 20,000 such recorders sold in the United States in any one calendar year after the date of the enactment of this chapter; or

(v) analog video cassette recorder that records using an NTSC format video input and that is not otherwise covered under clauses (i) through (iv), unless such device conforms to the automatic gain control copy control technology.

(B) Effective on the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in—

(i) any VHS format analog video cassette recorder or any 8mm format analog video cassette recorder if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the automatic gain control copy control technology no longer conforms to such technology; or

(ii) any VHS format analog video cassette recorder, or any 8mm format analog video cassette recorder that is not an 8mm analog video cassette camcorder, if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the four-line colorstripe copy control technology no longer conforms to such technology.

Manufacturers that have not previously manufactured or sold a VHS format analog video cassette recorder, or an 8mm format analog cassette recorder, shall be required to conform to the four-line colorstripe copy control technology in the initial model of any such recorder manufactured after the date of the enactment of this chapter, and thereafter to continue conforming to the four-line colorstripe copy control technology. For purposes of this subparagraph, an analog video cassette recorder "conforms to" the four-line colorstripe copy control technology if it records a signal that, when played back by the playback function of that recorder in the normal viewing mode, exhibits, on a reference display device, a dis-

play containing distracting visible lines through portions of the viewable picture.

(2) CERTAIN ENCODING RESTRICTIONS.—No person shall apply the automatic gain control copy control technology or colorstripe copy control technology to prevent or limit consumer copying except such copying—

(A) of a single transmission, or specified group of transmissions, of live events or of audiovisual works for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions;

(B) from a copy of a transmission of a live event or an audiovisual work if such transmission is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service;

(C) from a physical medium containing one or more prerecorded audiovisual works; or

(D) from a copy of a transmission described in subparagraph (A) or from a copy made from a physical medium described in subparagraph (C).

In the event that a transmission meets both the conditions set forth in subparagraph (A) and those set forth in subparagraph (B), the transmission shall be treated as a transmission described in subparagraph (A).

(3) INAPPLICABILITY.—This subsection shall not—

(A) require any analog video cassette camcorder to conform to the automatic gain control copy control technology with respect to any video signal received through a camera lens;

(B) apply to the manufacture, importation, offer for sale, provision of, or other trafficking in, any professional analog video cassette recorder; or

(C) apply to the offer for sale or provision of, or other trafficking in, any previously owned analog video cassette recorder, if such recorder was legally manufactured and sold when new and not subsequently modified in violation of paragraph (1)(B).

(4) DEFINITIONS.—For purposes of this subsection:

(A) An "analog video cassette recorder" means a device that records, or a device that includes a function that records, on electromagnetic tape in an analog format the electronic impulses produced by the video and audio portions of a television program, motion picture, or other form of audiovisual work.

(B) An "analog video cassette camcorder" means an analog video cassette recorder that contains a recording function that operates through a camera lens and through a video input that may be connected with a television or other video playback device.

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(C) An analog video cassette recorder “conforms” to the automatic gain control copy control technology if it—

- (i) detects one or more of the elements of such technology and does not record the motion picture or transmission protected by such technology; or
- (ii) records a signal that, when played back, exhibits a meaningfully distorted or degraded display.

(D) The term “professional analog video cassette recorder” means an analog video cassette recorder that is designed, manufactured, marketed, and intended for use by a person who regularly employs such a device for a lawful business or industrial use, including making, performing, displaying, distributing, or transmitting copies of motion pictures on a commercial scale.

(E) The terms “VHS format”, “8mm format”, “Beta format”, “automatic gain control copy control technology”, “colorstripe copy control technology”, “four-line version of the colorstripe copy control technology”, and “NTSC” have the meanings that are commonly understood in the consumer electronics and motion picture industries as of the date of the enactment of this chapter.

(5) VIOLATIONS.—Any violation of paragraph (1) of this subsection shall be treated as a violation of subsection (b)(1) of this section. Any violation of paragraph (2) of this subsection shall be deemed an “act of circumvention” for the purposes of section 1203(c)(3)(A) of this chapter.

(Added Pub. L. 105-304, title I, §103(a), Oct. 28, 1998, 112 Stat. 2863; amended Pub. L. 106-113, div. B, §1000(a)(9) [title V, §5006], Nov. 29, 1999, 113 Stat. 1536, 1501A-594.)

#### REFERENCES IN TEXT

The date of the enactment of this chapter, referred to in subsecs. (a)(1)(A), (g)(5), and (k)(1), (4)(E), is the date of enactment of Pub. L. 105-304, which was approved Oct. 28, 1998.

The Computer Fraud and Abuse Act of 1986, referred to in subsecs. (g)(2)(D) and (j)(2), is Pub. L. 99-474, Oct. 16, 1986, 100 Stat. 1213, which amended section 1030 of Title 18, Crimes and Criminal Procedure, and enacted provisions set out as a note under section 1001 of Title 18. For complete classification of this Act to the Code, see Short Title of 1986 Amendment note set out under section 1001 of Title 18 and Tables.

#### AMENDMENTS

1999—Subsec. (a)(1)(C). Pub. L. 106-113 struck out “on the record” after “determination in a rulemaking proceeding” in first sentence.

#### SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 112, 114, 1203, 1204 of this title.

### § 1202. 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 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

(c) DEFINITION.—As used in this section, 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:

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

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

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

(4) 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.

(5) 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.

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

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

(8) 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, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES.—This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a politi-

Calendar No. 358

105TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
105-190

THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998

MAY 11, 1998.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary,  
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2037]

The Committee on the Judiciary reported an original bill (S. 2037), to amend title 17, United States Code, to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, to provide limitations on copyright liability relating to material online, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

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I. PURPOSE

The "Digital Millennium Copyright Act of 1998" is designed to facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and edu-

cation in the digital age. Title I will implement the new World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, thereby bringing U.S. copyright law squarely into the digital age and setting a marker for other nations who must also implement these treaties. Title II will provide certainty for copyright owners and Internet service providers with respect to copyright infringement liability online. Title III will provide a clarifying exemption in the Copyright Act to ensure that the lawful owner or lessee of a computer machine may authorize an independent service technician to activate the computer in order to service its hardware components. Finally, Title IV will begin to update our nation's copyright laws with respect to library, archive, and educational uses of copyrighted works in the digital age.

## II. LEGISLATIVE HISTORY

Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music played on a player piano roll in the 1900's<sup>1</sup> to the introduction of the VCR in the 1980's.<sup>2</sup> With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials. The legislation implementing the treaties, Title I of this bill, provides this protection and creates the legal platform for launching the global digital online marketplace for copyrighted works. It will also make available via the Internet the movies, music, software, and literary works that are the fruit of American creative genius. Title II clarifies the liability faced by service providers who transmit potentially infringing material over their networks. In short, Title II ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will expand.

The process to update U.S. copyright law with respect to digital transmissions began in February, 1993, with the formation of the Information Infrastructure Task Force (IITF) to implement the Administration's vision for the National Information Infrastructure (NII).<sup>3</sup> The IITF then established the Working Group on Intellectual Property Rights to investigate the effects of emerging digital technology on intellectual property rights and make recommendations on any appropriate changes to U.S. intellectual property law and policy. This task force issued a report in 1995 known as the White Paper, which discussed the application of existing copyright law to the NII and recommended changes to keep copyright law current with new technology.<sup>4</sup>

To prepare the report, the Working Group held a public hearing in November 1993, at which 30 witnesses testified reflecting the views of copyright industries, libraries, educators, and beneficiaries of the public domain. The Working Group also solicited written comments and received some 70 statements during a public com-

<sup>1</sup> *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

<sup>2</sup> *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>3</sup> Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights 1 (1995). The "National Information Infrastructure" encompasses digital, interactive services now available, such as the Internet, as well as those contemplated for the future.

<sup>4</sup> *Id.* at 2.

ment period.<sup>5</sup> Following the Working Group's review of the public comments and analysis of the issues, it released a "Green Paper" on July 7, 1994.<sup>6</sup> Following the release of the Green Paper, the Working Group again heard testimony from the public in four days of hearings in Chicago, Los Angeles, and Washington, D.C., in September 1994. More than 1,500 pages of written comments were filed during the four-month comment period by more than 150 individuals and organizations.<sup>7</sup>

The Working Group also convened a Conference on Fair Use (CONFU) to explore the particularly complex issue of fair use in a digital environment and to develop guidelines for uses of copyrighted works by librarians and educators.<sup>8</sup> CONFU issued an Interim Report in December, 1996, and a report in September, 1997, that concluded the first phase of CONFU.<sup>9</sup> The 1997 report addressed the issues of digital images, distance learning, educational multimedia, electronic reserve systems, and use of computer software in libraries.

Interested parties had numerous opportunities to submit their views on the intellectual property implications of the development and use of the NII and on the Working Group's Green Paper. This open process resulted in a voluminous record indicating the views of a wide variety of interested parties including service providers, libraries, copyright owners, and the entertainment industries.<sup>10</sup>

On September 28, 1995, Chairman Hatch, with Senator Leahy, introduced the National Information Infrastructure (NII) Copyright Protection Act of 1995 (S. 1284), which embodied the legislative recommendations of the White Paper. Congressman Moorhead introduced identical legislation (H.R. 2441) in the House on September 29, 1995, with Congresswoman Schroeder as an original co-sponsor.<sup>11</sup> The Senate Judiciary Committee and the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee held a joint hearing on November 15, 1995, to consider the NII legislation. Dr. Mihaly Ficsor, Assistant Director General, World Intellectual Property Organization; Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks; and Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services testified at the hearing.

The House Subcommittee on Courts and Intellectual Property held a second set of hearings to consider H.R. 2441 on February 7 and 8, 1996. On February 7, the Subcommittee heard testimony from Jack Valenti, Chairman and CEO, Motion Picture Association of America; Frances W. Preston, President and CEO, Broadcast

<sup>5</sup> See Request for Comments on Intellectual Property Issues Involved in the National Information Infrastructure Initiative, 58 Fed. Reg. 53,917 (Oct. 19, 1993).

<sup>6</sup> See Information Infrastructure Task Force, Working Group on Intellectual Property Rights, Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights (July 1994).

<sup>7</sup> See Notice of Hearings and Request for Comments on Preliminary Draft of the Report of the Working Group on Intellectual Property Rights, 59 Fed. Reg. 42,819 (Aug. 19, 1994); Extension of Deadline for Comments on Preliminary Draft of the Report of the Working Group on Intellectual Property Rights, 59 Fed. Reg. 50,222 (Oct. 3, 1994).

<sup>8</sup> See, supra note 3, at 4 (1995).

<sup>9</sup> See *The Conference on Fair Use: An Interim Report to the Commissioner* (December 1996); *Report to the Commissioner on the Conclusion of the First Phase of the Conference on Fair Use* (September 1997).

<sup>10</sup> See, supra note 3, at 5 (1995).

<sup>11</sup> Representatives Coble, Bono, Burr, Minge, Luther, and Jacobs cosponsored H.R. 2241.

Music, Inc. (BMI); Edward P. Murphy, President and CEO, National Music Publishers Association; Robert Holleyman, II, President, Business Software Alliance; Edward J. Black, Computer & Communications Industry Association; Barbara A. Munder, Senior Vice President, Corporate Affairs, McGraw Hill Co. and on behalf of the Information Industry Association; Gary L. Shapiro, Chairman, Home Recording Rights Coalition and President, Consumer Electronics Manufacturers Association; Garry L. McDaniels, President, Skills Bank Corporation; and David M. Ostfeld, Vice Chairman, U.S. Activities Board Institute for Electrical and Electronics Engineers, and Vice Chairman, United States Intellectual Property Committee.

On February 8, the Subcommittee heard testimony from Jeanne Hurley Simon, Chair, U.S. National Commission on Libraries and Information Science; Dr. Tuck Tinsley III, President, American Printing House for the Blind, Inc.; Richard Robinson, Chair, President & CEO, Scholastic Corp., for the Association of American Publishers; Cornelius Pings, President, Association of American Universities; Stephen M. Heaton, Secretary and General Counsel, CompuServe, Inc.; Scott Purcell, President, HLC-Internet, Inc.; William J. Cook, Partner, William, Brinks, Hofer, Gilson & Lione; Catherine Simmons-Gill, President, International Trademark Association.

On May 7, 1996, the Senate Judiciary Committee also an additional hearing to consider S. 1284. The Committee heard testimony from John Bettis of the American Society of Composers, Authors, and Publishers (ASCAP); William W. Burrington, Assistant General Counsel and Director of Public Policy, America Online, Inc.; Robert L. Oakley, Professor of Law and Director of the Law Library, Georgetown University Law Center, on behalf of the Digital Future Coalition; and Daniel Burton, Vice President of Government Relations, Novell, Inc.

These hearings were supplemented by a series of negotiations overseen by Congressman Goodlatte of the House Subcommittee on Courts and Intellectual Property in which representatives of copyright owners and Internet and online service providers sought to resolve the contentious issue of the scope of liability of service providers for the infringing acts of their users. Agreement was reached on some issues, but many of the core issues remained unresolved. Negotiations resumed under the auspices of the Patent and Trademark Office in the summer of 1996, but produced no resolution of those issues. Ultimately, the NII Copyright Protection Act stalled in the 104th Congress due largely to the unsettled nature of these and other issues.

Meanwhile, parallel efforts to ensure protection of copyrighted works in the digital age proceeded on the international front. These efforts originated shortly after the United States ratified the Berne Convention in 1989, when the governing body of the Berne Union called upon WIPO to form a Committee of Experts concerning a possible supplementary agreement to the Berne Convention to clarify the existing provisions and explore the scope of the treaty.<sup>12</sup> The

<sup>12</sup>Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference

result was the introduction of formal proposals to update the Berne Convention to reflect the challenges of the digital age ("Protocol") and to supplement that instrument with enhanced protections for performers and producers of phonograms ("New Instrument"). In December, 1996, the World Intellectual Property Organization held a diplomatic conference in Geneva, Switzerland, which culminated with the adoption of two treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty," which were agreed to by consensus of 160 countries.

The WIPO Copyright Treaty originally contained a provision, article 7, which would have defined the term "reproduction" of a copyrighted work to include any direct or indirect reproduction whether permanent or temporary, in any manner or form.<sup>13</sup> This article proved to be too controversial and was deleted from the treaty prior to its adoption. Instead, the treaty was accompanied by an agreed upon statement that simply confirmed that the reproduction right in Article 9 of the Berne Convention applies fully in the digital environment. The treaty also originally contained language that banned circumvention devices. Again, controversy resulted in a milder declaration that member countries "shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty."<sup>14</sup> The end result is that the treaty shifted the debate over technological circumvention measures and on-line service provider liability back to the national level, where each nation will determine how to best conform with the treaty.

The President submitted the WIPO treaties to the U.S. Senate on July 29, 1997, where they were referred to the Foreign Relations Committee. The Administration also submitted draft implementing legislation, which Chairman Hatch introduced by request as S. 1121 on July 31, 1997. Senators Leahy, Thompson, and Kohl joined as original cosponsors. Congressman Coble introduced identical legislation in the House as H.R. 2281 on July 29, 1997.<sup>15</sup> S. 1121 later became the basis for Title I of the Digital Millennium Copyright Act in the Senate Judiciary Committee.

With respect to the issue of service provider liability, two bills were introduced in the first session of the 105th Congress. Congressman Coble introduced H.R. 2180 on July 17, 1997, with Congressman Hyde as a cosponsor. Senator Ashcroft introduced S. 1146 on September 3, 1997, which proposed limitations on copyright liability relating to material on-line for service providers as well as amendments to the Copyright Act to implement the WIPO Treaties and make certain changes to accommodate libraries and educators in the digital environment.

The Senate Judiciary Committee conducted hearings on September 4, 1997, to consider the issues surrounding service provider li-

on Certain Copyright and Neighboring Rights Questions, WIPO Document AB/XX/2, Annex A, item PRG.02(2), paragraph 1 (Aug. 30, 1996).

<sup>13</sup> World Intellectual Property Organization, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference, art. 7(1) (Aug. 30, 1996).

<sup>14</sup> Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, WIPO Copyright Treaty, art. 11, WIPO Document CRNR/DC/94 (December 20, 1996).

<sup>15</sup> Representatives Hyde, Conyers, Frank, Bono, McCullum, and Berman cosponsored the bill.



ability. Testimony was heard from Fritz Attaway, Senior Vice President, Government Relations and Washington General Counsel, Motion Picture Association of America; Cary Sherman, General Counsel, Recording Industry Association of America; Daniel F. Burton, Vice President, Government Relations, Novell; George Vradenburg, Senior Vice President and General Counsel, America Online, Inc.; Roy Neel, President and C.E.O., U.S. Telephone Association; and Professor Robert L. Oakley, Director of Law Library and Professor Law, Georgetown University Law Center. At this hearing, parties on all sides were urged by Chairman Hatch and the Ranking Member, Senator Leahy, to resolve the remaining issues prior to the end of the year.

Shortly thereafter, a series of hearings were held in the House on these issues as well as on the issue of WIPO implementation. The Subcommittee on Courts and Intellectual Property of the House Judiciary Committee held two days of hearings on H.R. 2281, the WIPO Copyright Treaties Implementation Act, and H.R. 2180, the Online Copyright Liability Limitation Act, on September 16 and 17, 1997. Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Patent and Trademark Office, and Marybeth Peters, Register of Copyrights, Copyright Office of the United States, Library of Congress testified on behalf of the Administration. The Subcommittee also heard testimony from Roy Neel, President and Chief Executive Officer, United States Telephone Association; Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America; Robert Holleyman, II, President, Business Software Alliance; M.R.C. Greenwood, Chancellor, University of California, Santa Cruz, on behalf of the Association of American Universities and the National Association of State Universities and Land Grant Colleges; Tushar Patel, Vice President and Managing Director, USWeb, Lawrence Kenswil, Executive Vice President, Business and Legal Affairs, Universal Music Group; Marc Jacobson, General Counsel, Prodigy Services, Inc.; Ken Wasch, President, Software Publishers Association; Ronald G. Dunn, President, Information Industry Association; John Bettis, Songwriter, on behalf of the American Society of Composers, Authors, and Publishers; Allee Willis, Songwriter, on behalf of Broadcast Music, Inc. (BMI); Robert L. Oakley, Professor of Law, Georgetown University Law Center and Director, Georgetown Law Library, on behalf of a Coalition of Library and Educational Organizations; Johnny Cash, Vocal Artist, with Hilary Rosen, President and Chief Executive Officer, Recording Industry Association of America; Allan Adler, Vice President, Legal and Governmental Affairs, Association of American Publishers; Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association; Mike Kirk, Executive Director, American Intellectual Property Law Association; Thomas Ryan, President, SciTech Software, Inc.; Mark Belinsky, Vice President Copy Protection Group, Macrovision, Inc.; Douglas Bennett, President, Earlham College, Vice President, American Council of Learned Societies, on behalf of the Digital Futures Coalition; Edward J. Black, President, Computer and Communications Industry Association; Christopher Byrne, Director of Intellectual Property, Silicon Graphics, Inc., on behalf of the Information Technology Industry Council; and Gary

Shapiro, President, Consumer Electronics Manufacturer's Association, and Chairman, Home Recording Rights Coalition.

In January, 1998, Chairman Hatch initiated comprehensive negotiations within the Judiciary Committee among copyright owners and Internet and online service providers to resolve the issue of service provider liability. These negotiations centered around a draft proposal put forth by Chairman Hatch, which built upon the efforts over the previous two years. These negotiations continued under the supervision of the Chairman for three months, from January to April, 1998.

On February 26, 1998, the House Subcommittee on Courts and Intellectual Property conducted a markup of H.R. 2281, the WIPO Copyright Treaties Implementation Act, and of H.R. 3209, the On-Line Copyright Infringement Liability Limitation Act. H.R. 2281 and H.R. 3209 were reported favorably by voice vote to the House Judiciary Committee. On April 1, 1998, the full Committee adopted a substitute amendment to H.R. 2281, offered by Congressmen Coble, Hyde, Conyers, and Goodlatte, which incorporated both the provisions of H.R. 2281 and provisions regarding service provider liability in anticipation of a resolution of this issue that appeared to be close in the Senate Judiciary Committee. H.R. 2281 was then favorably reported to the House of Representatives.

On April 2, 1998, Chairman Hatch offered the "Digital Millennium Copyright Act of 1998" at an executive business meeting of the Committee. This bill incorporated the text of S. 1121, a proposal for resolving the issue of service provider liability for copyright infringement, and a provision that had been agreed to by the House Judiciary Committee with respect to computer maintenance and repair.

On April 23, 1998, the Committee met again in executive session to consider the bill. At that meeting, the Committee considered and accepted two amendments offered by Chairman Hatch, with Senators Leahy and Ashcroft, and one amendment offered by Senator Ashcroft, with Senators Leahy and Hatch, en bloc, by unanimous consent. These amendments dealt with reverse engineering of computer programs for interoperability purposes, ephemeral recordings, and an exemption for libraries and archives from copyright infringement liability.

On April 30, 1998, the Judiciary Committee resumed consideration of the bill and accepted the following ten amendments en bloc, by unanimous consent: an amendment by the Chairman (for himself, Mr. Leahy and Mr. Ashcroft), with respect to ephemeral recordings; an amendment by the Chairman (for himself, Mr. Leahy and Mr. Ashcroft), with respect to the use of copyright management information in the course of certain analog and digital transmissions; an amendment by the Chairman (for himself and Mr. Leahy), to make certain clarifying amendments; an amendment by Mr. Ashcroft (for himself, Mr. Leahy and Mr. Hatch), with respect to protection of subscribers of online and Internet service providers; an amendment by Mr. Ashcroft (for himself, Mr. Hatch and Mr. Leahy), with respect to the accommodation of particular technological protection measures; an amendment by Mr. Ashcroft (for himself, Mr. Hatch and Mr. Leahy), with respect to protection of personal privacy interests; an amendment by Mr. Ashcroft (for

himself, Mr. Hatch and Mr. Leahy), with respect to the preservation of the ability to control minors' access to material on the Internet; an amendment by Mr. Ashcroft (for himself, Mr. Leahy and Mr. Hatch), with respect to distance education through digital technologies; an amendment by Mr. Grassley (for himself and Mr. Kyl), with respect to law enforcement and intelligence activities; and an amendment by Mrs. Feinstein, with respect to the liability of non-profit educational institutions for copyright infringement online. The Committee then unanimously ordered the Digital Millennium Copyright Act of 1998 reported favorably, as amended.

### III. DISCUSSION

The Digital Millennium Copyright Act (DMCA) in Title I implements the World Intellectual Property (WIPO) treaties on copyright and on performers and phonograms, and in Title II limits the copyright infringement liability of on-line and Internet service providers (OSPs and ISPs) under certain circumstances. The DMCA also provides in Title III a minor but important clarification of copyright law that the lawful owner or lessee of a computer may authorize someone to turn on their computer for the purposes of maintenance or repair. Title IV addresses the issues of ephemeral recordings, distance education, and digital preservation for libraries and archives.

Due to the ease with which digital works can be copied and distributed worldwide virtually instantaneously, copyright owners will hesitate to make their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy. Legislation implementing the treaties provides this protection and creates the legal platform for launching the global digital on-line marketplace for copyrighted works. It will facilitate making available quickly and conveniently via the Internet the movies, music, software, and literary works that are the fruit of American creative genius. It will also encourage the continued growth of the existing off-line global marketplace for copyrighted works in digital format by setting strong international copyright standards.

At the same time, without clarification of their liability, service providers may hesitate to make the necessary investment in the expansion of the speed and capacity of the Internet. In the ordinary course of their operations service providers must engage in all kinds of acts that expose them to potential copyright infringement liability. For example, service providers must make innumerable electronic copies by simply transmitting information over the Internet. Certain electronic copies are made to speed up the delivery of information to users. Other electronic copies are made in order to host World Wide Web sites. Many service providers engage in directing users to sites in response to inquiries by users or they volunteer sites that users may find attractive. Some of these sites might contain infringing material. In short, by limiting the liability of service providers, the DMCA ensures that the efficiency of the Internet will continue to improve and that the variety and quality of services on the Internet will continue to expand.

Besides the major copyright owners and the major OSP's and ISP's (e.g., the local telephone companies, the long distance car-

riers, America OnLine, etc.), the Committee heard from representatives of individual copyright owners and small ISP's, from representatives of libraries, archives and educational institutions, from representatives of broadcasters, computer hardware manufacturers, and consumers. Title II, for example, reflects 3 months of negotiations supervised by Chairman Hatch and assisted by Senator Ashcroft among the major copyright owners and the major OSP's and ISP's. Intense discussions took place on distance education too, with the participation of representatives of libraries, teachers, and educational institutions, under the supervision of Chairman Hatch, Senator Leahy, Senator Ashcroft, and the Copyright Office.

As a result, the Committee took substantial steps to refine the discussion draft that Chairman Hatch laid down before the Committee through a series of amendments, each of which was adopted unanimously. For example, the current legislation contains: (1) a provision to ensure that parents will be able to protect their children from pornography and other inappropriate material on the Internet; (2) provisions to provide for the updating of the copyright laws so that educators, libraries, and archives will be able to take advantage of the promise of digital technology; (3) important procedural protections for individual Internet users to ensure that they will not be mistakenly denied access to the World Wide Web; (4) provisions to ensure that the current practice of legitimate reverse engineering for software interoperability may continue; and (5) provisions to accommodate the needs of broadcasters for ephemeral recordings and regarding copyright management information. These provisions are in addition to provisions Chairman Hatch had already incorporated into the discussion draft, such as provisions on library browsing, provisions addressing the special needs of individual creators regarding copyright management information, and provisions exempting nonprofit archives, nonprofit educational institutions, and nonprofit libraries from criminal penalties and, in the case of civil penalties, remitting damages entirely when such an institution was not aware and had no reason to believe that its acts constituted a violation.

Consequently, the DMCA enjoys widespread support from the motion picture, recording, software, and publishing industries, as well as the telephone companies, long distance carriers, and other OSP's and ISP's. It is also supported by the Information Technology Industry Council, which includes the leading computer hardware manufacturers, and by representatives of individual creators, such as the Writers Guild, the Directors Guild, the Screen Actors Guild, and the American Federation of Television and Radio Artists. The breadth of support for this bill is reflected in the unanimous roll call vote (18-0) by which the DMCA was reported out of Committee.

#### TITLE I

Title I implements the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These treaties were concluded by the Clinton administration in December 1996. The treaties are best understood as supplements to the Berne Convention for the Protection of Literary and Artistic Works. The Berne Convention is the leading multilateral treaty on copyright and related

rights, with 130 countries adhering to it. The United States ratified the Berne Convention in 1989. The two new WIPO treaties were adopted at a diplomatic conference by a consensus of over 150 countries. In general, the Copyright Treaty updates the Berne Convention for digital works and the growth of the Internet and other digital communications networks, and the Performances and Phonograms Treaty supplements the Berne Convention with comprehensive copyright protection for performances and sound recordings (called “phonograms” in international parlance).

The importance of the treaties to the protection of American copyrighted works abroad cannot be overestimated. The treaties, as well as the Berne Convention, are based on the principle of national treatment; that is, that adhering countries are obliged to grant the same protection to foreign works that they grant to domestic works. Even more importantly, the Berne Convention and the treaties set minimum standards of protection. Thus, the promise of the treaties is that, in an increasing global digital marketplace, U.S. copyright owners will be able to rely upon strong, non-discriminatory copyright protection in most of the countries of the world.

The copyright industries are one of America’s largest and fastest growing economic assets. According to International Intellectual Property Alliance statistics, in 1996 (when the last full set of figures was available), the U.S. creative industries accounted for 3.65 percent of the U.S. gross domestic product (GDP)—\$278.4 billion. In the last 20 years (1977–1996), the U.S. copyright industries’ share of GDP grew more than twice as fast as the remainder of the economy—5.5 percent vs. 2.6 percent. Between 1977 and 1996, employment in the U.S. copyright industries more than doubled to 3.5 million workers—2.8 percent of total U.S. employment. Between 1977 and 1996 U.S. copyright industry employment grew nearly three times as fast as the annual rate of the economy as a whole—4.6 percent vs. 1.6 percent. In fact, the copyright industries contribute more to the U.S. economy and employ more workers than any single manufacturing sector, including chemicals, industrial equipment, electronics, food processing, textiles and apparel, and aircraft. More significantly for the WIPO treaties, in 1996 U.S. copyright industries achieved foreign sales and exports of \$60.18 billion, for the first time leading all major industry sectors, including agriculture, automobiles and auto parts, and the aircraft industry.

The WIPO treaties contain many important provisions. For example, the Copyright Treaty contains significant provisions such as: (1) explicit recognition that computer programs are covered by the Berne Convention; (2) recognition of a broad right of public distribution; (3) recognition of a broad right of communication to the public that includes the Internet; (4) an official statement that interprets the existing reproduction right of the Berne Convention to “fully apply in the digital environment”;<sup>16</sup> (5) an obligation to provide “legal protection and effective legal remedies” against circumventing technological measures, e.g. encryption and password protection, that are used by copyright owners to protect their works

<sup>16</sup>Concerning Art. 1(4).

from piracy;<sup>17</sup> and (6) an obligation to provide “adequate and effective legal remedies” to preserve the integrity of “rights management information.”<sup>18</sup> The Performances and Phonograms Treaty recognizes certain rights of performers over their performances and basically gives the copyright owners of sound recordings the same protection for their works as exist in the Berne Convention for other works.

The Committee believes that in order to adhere to the WIPO treaties, legislation is necessary in two primary areas—anticircumvention of technological protection measures and protection of the integrity of rights management information, or “copyright management information” (CMI), as it is referred to in the bill. This view is shared by the Clinton administration. In drafting implementing legislation for the WIPO treaties, the Committee has sought to address those two areas, as well as avoid government regulation of the Internet and encourage technological solutions. The Committee is keenly aware that other countries will use U.S. legislation as a model.

#### A. ANTICIRCUMVENTION

Title I encourages technological solutions, in general, by enforcing private parties’ use of technological protection measures with legal sanctions for circumvention and for producing and distributing products or providing services that are aimed at circumventing technological protection measures that effectively protect copyrighted works. For example, if unauthorized access to a copyrighted work is effectively prevented through use of a password, it would be a violation of this section to defeat or bypass the password and to make the means to do so, as long as the primary purpose of the means was to perform this kind of act.<sup>19</sup> This is roughly analogous to making it illegal to break into a house using a tool, the primary purpose of which is to break into houses.

Legislation prohibiting circumvention devices is not unprecedented. The Copyright Act in section 1002(c) already protects sound recordings and musical works by prohibiting devices which circumvent any program or circuit that implements a serial copy management system or similar system included in digital audio recording devices and digital audio interface devices. The Communications Act in section 605(e)(4) prohibits devices that are “primarily of assistance in the unauthorized decryption of satellite cable programming.” In addition to the WIPO Copyright Treaty, the NAFTA in article 1707(b) requires each party to make it a criminal offense to make available a device or system that is “primarily of assistance in decoding an encrypted program-carrying

<sup>17</sup>Art. 11.

<sup>18</sup>Rights management information is “information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work . . . which is attached to a copy of a work or appears in connection with communication of the work to the public.” Art. 12. Rights management information is more commonly referred to in the U.S. as copyright management information (CMI). The purpose of CMI is to facilitate licensing of copyright for use on the Internet and to discourage piracy.

<sup>19</sup>Note that even if a device does not have circumvention as its primary purpose or design, that is, that it does not fall within the prohibition of section 1201(a)(2)(A), the device would still be illegal if it fell within the prohibitions of either 1201 (a)(2)(B) and (C).

satellite signal without the authorization of the lawful distributor of such signal.'

Although sections 1201(a)(2) and 1201(b) of the bill are worded similarly and employ similar tests, they are designed to protect two distinct rights and to target two distinct classes of devices. Subsection 1201(a)(2) is designed to protect access to a copyrighted work. Section 1201(b) is designed to protect the traditional copyright rights of the copyright owner. As a consequence, subsection 1201(a)(2) prohibits devices primarily designed to circumvent effective technological measures that limit access to a work. Subsection 1201(b), on the other hand, prohibits devices primarily designed to circumvent effective technological protection measures that limit the ability of the copyrighted work to be copied, or otherwise protect the copyright rights of the owner of the copyrighted work. The two sections are not interchangeable, and many devices will be subject to challenge only under one of the subsections. For example, if an effective technological protection measure does nothing to prevent access to the plain text of the work, but is designed to prevent that work from being copied, then a potential cause of action against the manufacturer of a device designed to circumvent the measure lies under subsection 1201(b), but not under subsection 1201(a)(2). Conversely, if an effective technological protection measure limits access to the plain text of a work only to those with authorized access, but provides no additional protection against copying, displaying, performing or distributing the work, then a potential cause of action against the manufacturer of a device designed to circumvent the measure lies under subsection 1201(a)(2), but not under subsection 1201(b).

This, in turn, is the reason there is no prohibition on conduct in 1201(b) akin to the prohibition on circumvention conduct in 1201(a)(1). The prohibition in 1201(a)(1) is necessary because prior to this Act, the conduct of circumvention was never before made unlawful. The device limitation in 1201(a)(2) enforces this new prohibition on conduct. The copyright law has long forbidden copyright infringements, so no new prohibition was necessary. The device limitation in 1201(b) enforces the longstanding prohibitions on infringements.

*Accommodation of particular technological protection measures*

The Committee was concerned that the provisions of subsections 1201(a)(2) and (b) might be read to mandate that manufacturers of consumer electronics, telecommunications, and computing products design their products and components to respond to particular technological protection measures employed to protect copyrighted works. Subsection 1201(d)(3) addresses this concern and clarifies that section 1201 does not impose any affirmative design mandates on manufacturers of consumer electronics, telecommunications, and computing products. The fact that a product or component does not respond to any particular technological protection measure, standing alone, neither creates liability under section 1201 nor immunizes those trafficking in the product, part or component from liability. This provision recognizes that there may be legitimate reasons for a product or component's failure to respond to a particular technological measure—such as design efficiency or ensuring high

quality output from the product—as well as illegitimate reasons—such as an unlawful intent to circumvent the protection measure.

That a component or part's failure to respond to a technological measure does not immunize the product or component from further review under section 1201 is made clear by the following example. Suppose a device expressly intended to circumvent an effective technological protection measure commonly employed to protect copyrighted works contained a component that was critical to the effectiveness of the device in achieving its stated purpose. Suppose further that the product was marketed as a circumvention device and had no commercially significant purposes or use other than to circumvent. That component would not provide the desired response to the effective technological protection measure, but the product would still clearly run afoul of section 1201 in light of the device manufacturer's unlawful intent, the marketing strategy and the lack of other commercially significant uses for the product.

On the other hand, suppose a manufacturer of a state-of-the-art consumer electronics device, which did not circumvent any technological protection measure when it was introduced into the market and which was designed and marketed for a purpose other than circumventing any technological protection measures, was sued for violating section 1201 because the device did not accommodate a particular technological protection measure developed after the device was designed and sold. In such a case, section 1201(d)(3) would make it clear that the device's failure to accommodate this new protection measure does not render the device unlawful, and in light of the nature of the product, the manner in which it functions, the way it had been marketed and its obvious legitimate uses (assuming the device continues to be marketed and produced for the same legitimate uses), there would clearly be no basis for arguing that the device was unlawful under section 1201.

#### *Library browsing*

Section 1201(e) allows nonprofit libraries, archives, and educational institutions to gain access to a commercially exploited copyrighted work solely to make the determination of whether to acquire a copy of the work.

#### *Reverse engineering*

Sections 1201(g)–(j) are intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability to the extent permitted by law prior to the enactment of this chapter. The objective is to ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs. See, *Sega Enterprises Ltd. v Accolade, Inc.*, 977 F.2d 1510, 24 U.S.P.Q.2d 1561 (9th Cir. 1992.). The purpose of this section is to foster competition and innovation in the computer and software industry.

#### *Controlling the access of minors to material on the Internet*

The Committee supports the voluntary efforts underway by a broad group of Internet users, library groups, publishers and other



copyright industry groups, family-focused organizations, on-line service providers, and civil liberties groups to empower parents to supervise and control the material their children access from the Internet. Nothing in this bill is intended to undercut these efforts.

To emphasize this point, an amendment (section 1201(k)) sponsored by Senator Ashcroft, Chairman Hatch and Senator Leahy was adopted unanimously by the Committee to ensure that the prohibitions in section 1201(a) did not inadvertently make it unlawful for parents to protect their children from pornography and other inappropriate 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 1201(k) makes clear that in a suit brought under section 1201(a), a court may consider the necessity for a challenged component or part's intended and actual incorporation into a technology, product, service or device, which does not itself violate the provisions of new chapter 12 on Copyright Protection and Management Systems, and which has the sole purpose of preventing the access of minors to pornography or other inappropriate material on the Internet. This provision applies to subsection 1201(a) in its entirety (as opposed to subsection 1201(a)(2) alone) in order to clarify that the bill protects the actions of parents in ensuring that their children do not have access to inappropriate material on-line.

A variety of tools available now allow parents to exercise control in a manner consistent with their own family values, of their children's access to online materials. In the event that, in the future, any of these tools incorporates a part or component which circumvents a technological protection measure effectively controlling access to a copyrighted work solely in order to provide a parent with the information necessary to ascertain whether that material is appropriate for his or her child, this provision authorizes a court to take into consideration the necessity for incorporating such part or component in a suit alleging a violation of section 1201(a).

This provision is limited to the application of subsection (a) because the Committee does not anticipate that it would be necessary for parental empowerment tools to make copies of questionable material, or to distribute or perform it, in order to carry out their important function of assisting parents in guiding their children on the Internet. Accordingly, circumvention of copy controls, or of similar measures, should never be a necessary capability of a parental empowerment tool. By the same token, if a technology, product, service or device which (1) has the sole purpose of preventing the access of minors to certain materials on the Internet, and (2) that technology, product, service or device circumvents a technological protection measure that effectively controls access to a work as defined in subsection 1201(a)(3) only for the purpose of gaining access to the work to ascertain whether it is suitable for a minor, but does not otherwise defeat any copy protection for that work, then that technology, product, service or device is only subject to challenge under subsection 1201(a)(2) and not subsection 1201(b). In such circumstances, no cause of action would lie under section 1201(b) and therefore limiting language would be unnecessary.

This provision is not to be interpreted to allow the wholesale access to copyrighted works in their entirety, but merely to allow par-

ents to have an ability to determine whether a work is inappropriate for that parent's child.

*Encryption research*

The purpose of the Committee in proposing enactment of section 1201 is to improve the ability of copyright owners to prevent the theft of their works, including by applying technological protection measures. The effectiveness of such measures 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.

The goals of section 1201 would be poorly served if these provisions had the undesirable and unintended consequence of chilling legitimate research activities in the area of encryption. It is the view of the Committee, after having conducted extensive consultations, and having examined a number of hypothetical situations, that Section 1201 should not have such an unintended negative effect.

It is the view of the Committee that generally available encryption testing tools would not be made illegal by this Act. Each of those tools has a legitimate and substantial commercial purpose—testing security and effectiveness—and are not prohibited by Section 1201. In addition, the testing of specific encryption algorithms would not fall within the scope of 1201, since mathematical formulas as such are not protected by copyright. Thus, testing of an encryption algorithm or program that has multiple uses, including a use as a technical protection measure for copyrighted works, would not fall within the prohibition of section 1201(a) when that testing is performed on the encryption when it is in a form not implemented as a technical protection measure. Similarly, the testing of encryption technologies developed by or on behalf of the government of the United States, would not violate section 1201 since copyright does not subsist in such subject matter. Finally, there are many situations in which encryption research will be undertaken with the consent or at the direction of the copyright owner and therefore will not give rise to any action under section 1201.

For these reasons, it is the view of the Committee that the following types of encryption testing are not generally prohibited by section 1201.

If a cryptographer uses various cryptanalytic research techniques to discover a flaw in, for example, the U.S. government's Escrowed Encryption Standard (EES) used in the Clipper Chip and Fortezza cards. The flaw allows users to circumvent essential features of the algorithm. Since these encryption products are not covered by copyright, because they are merely mathematical algorithms in addition to being owned by the U.S. government, these acts do not violate 1201, and the results may be made available to the public.

If a company, in the course of developing a new cryptographic product, sponsors a crypto-cracking contest with cash prizes, contestants would not violate section 1201 since the research acts are specifically authorized.

Significantly, section 1201 does not make illegal cryptographic devices that have substantial legitimate purposes other than to circumvent technological protection measures as applied to a work. For example, many popular word processing and other computer programs include a security feature allowing users to password-protect documents (employing a low-grade form of encryption.) It is not uncommon for users of such products to forget or lose their passwords for such documents, making their own protected works unrecoverable. As a result, many independent programmers have created utilities designed to assist in the recovery of passwords or password-protected works. Several of these utilities are distributed over the Internet as freeware or shareware. Because these utilities have a substantial legitimate use, and because they would be used by persons to gain access to their own works, these devices do not violate section 1201.

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. So long as these devices would have a substantial legitimate use, and they do not become principally used to facilitate infringement, they would not be prohibited by section 1201.

Today, network and web site management and security tools increasingly contain components that automatically 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. Again, because these devices do not meet the test of section 1201, because they are good products put to a good use, the devices do not fall within the scope of this statute.

#### B. COPYRIGHT MANAGEMENT INFORMATION

Copyright Management Information (CMI) is an important element in establishing an efficient Internet marketplace in copyrighted works free from governmental regulation. Such information will assist in tracking and monitoring uses of copyrighted works, as well as licensing of rights and indicating attribution, creation and ownership.

Under the bill, CMI includes such items as the title of the work, the author, the copyright owner, and in some instances, the writer, performer, and director. CMI need not be in digital form, but CMI in digital form is expressly included. It is important to note that the DMCA does not *require* CMI, but if CMI is provided, the bill protects it from falsification, removal or alteration. Information that is not defined as CMI under the bill would not be protected by these provisions, although its removal or falsification might be protected under other laws, such as unfair trade. The definition of CMI may be expanded by regulation prescribed by the Register of Copyrights.

Section 1202(a) prohibits knowingly providing CMI that is false or knowingly distributing CMI that is false with the intent to induce, enable, facilitate or conceal infringement. Section 1202(b) prohibits (1) the intentional removal or alteration of CMI, (2) the distribution of CMI knowing that the information has been re-

moved or altered, and (3) the distribution or public performance of works knowing or having reason to know that CMI has been removed or altered, so long as, regarding the prohibited acts described in section 1202(b), there is knowledge or reasonable grounds to know that these acts will induce, enable, facilitate or conceal an infringement.

Section 1202(e) recognizes special problems that certain broadcasting entities may have with the transmission of copyright management information. Under this subsection, 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 (eligible persons) may be eligible for a limitation on liability for violation of the copyright management information provisions of section 1202(b) in certain, limited circumstances.

#### C. CIVIL REMEDIES AND CRIMINAL PENALTIES

Section 1203 gives civil remedies and section 1204 imposes criminal penalties for violations of sections 1201 and 1202.

In addition to an award of damages, section 1203(b) provides for various kinds of affirmative relief in civil actions such as temporary and permanent injunctions, impoundment, and, as part of a final judgment or decree finding a violation, the court may order remedial modification or destruction of the offending device or product. Such affirmative relief is currently found in the Copyright Act for copyright infringements.

Regarding monetary relief, section 1203 provides for actual damages, profits derived from the unlawful activity, statutory damages, and treble damages for repeat offenders. Such monetary relief is available under the current Copyright Act.

An important feature of section 1203 is the remittitur for innocent violators and for nonprofit libraries, archives, and educational institutions. In the case of a violator who was not aware and had no reason to believe that the acts at issue constituted a violation, the court may reduce or remit the total award of damages. In the cases of nonprofit libraries, archives, and educational institutions the court must remit damages if the institution was not aware and had no reason to believe that its acts constituted a violation.

The current Copyright Act provides for criminal penalties for copyright infringement. Section 1204 of the bill also provides criminal penalties for violations of section 1201(a) and (b). Specifically, willful violations of sections 1201 or 1202 for purposes of commercial advantage or private financial gain are punished by up to \$500,000 in fines or imprisonment for up to 5 years. Repeat offenses are punishable by up to \$1,000,000 in fines or imprisonment for up to 10 years. The bill requires that criminal proceedings be commenced within 5 years after the cause of action arose. Criminal penalties do not apply to nonprofit libraries, archives, and educational institutions.

#### D. PROTECTING PERSONAL PRIVACY INTERESTS

Section 1205 responds to concerns expressed by some that certain technologies used to gather personally identifiable information

from Internet users could be characterized as technological protection measures for copyrighted materials, and that therefore efforts by Internet users to protect their privacy by disabling or bypassing such technologies could be prohibited by section 1201. The Committee does not believe that enactment of this legislation will have this effect. No specific example of such a privacy-invasive technology in use today that would be affected in this way has been called to the Committee's attention. For example, even if "cookie" files—which are automatically deposited on the hard drives of computers of users who visit World Wide Web sites—are considered to be invasive of personal privacy (and are deemed to be copyrighted works), all commercially significant browser programs can be readily configured to reject "cookies," and such a configuration raises no issue of any violation of section 1201.

In fact, enactment of section 1201 should have a positive impact on the protection of personal privacy on the Internet. The same technologies that copyright owners use to control access to and use of their works can and will be used to protect the personal privacy of Internet users by, for example, encrypting e-mail communications, or requiring a password for access to personal copyrighted information on an individual's web site. By outlawing the activities of those who make it their business to provide the tools for circumventing these protective technologies, this legislation will substantially enhance the degree to which individuals may protect their privacy as they work, play and communicate on the Internet.

However, because of the privacy concerns expressed that existing or future technologies may evolve in such a way that an individual would have to circumvent a technological protection measure to protect his or her privacy, the committee concluded that it was prudent to rule out any scenario in which section 1201 might be relied upon to make it harder, rather than easier, to protect personal privacy on the Internet. Accordingly, Senator Ashcroft, Chairman Hatch and Senator Leahy proposed a savings clause to clarify that nothing in the new chapter 12 will abrogate, diminish or weaken the provisions of any Federal or State law that prevents the violation of an individual's privacy in connection with the individual's use of the Internet. The savings clause also specifies that section 1201 cannot be used to provide a defense, or an element of mitigation, in any civil or criminal action to enforce such a law. For example, if a valid Federal or State law regulates, on personal privacy grounds, the use of "cookie" files, which are automatically placed on the computer hard drives of users as they visit Internet web sites, and a party with standing sues to enforce the limitations contained in that law, the defendant may not excuse his actions in violation of those limitations by pointing to anything in chapter 12 of title 17.

#### *Law enforcement*

Sections 1201(f) and 1202(d) create exceptions 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. These exceptions will protect officers, agents, employees, or contractors of, or other persons acting at the

direction of, a law enforcement or intelligence agency of the United States, a State, or a political subdivision of a State, who are performing lawfully authorized investigative, protective, or intelligence activities. These exceptions will also protect officers, agents, employees, or contractors of, or other persons acting at the direction of, elements or divisions of an agency or department of the United States, a State, or a political subdivision of a State, which does not have law enforcement or intelligence as its primary function, but who may nevertheless, in the course of lawfully authorized protective, intelligence, or criminal investigative activities, engage in actions otherwise prohibited by this bill. These exceptions only apply to individuals covered under this section when they are performing investigative, protective, or intelligence activities, within the scope of their duties and in furtherance of lawfully authorized activities.

The Committee is concerned that these sections should not be misinterpreted as an opportunity to circumvent the WIPO Copyright Treaty. It should be clear that this is a routine law enforcement and intelligence exception. As such, the exceptions under sections 1201(f) and 1202(d) are to be narrowly construed. In addition, these exceptions are to be construed in a manner consistent with similar law enforcement and intelligence exceptions found elsewhere in U.S. law, such as 18 U.S.C. 1029(f), 1030(f), or 2512(2)(b).

## TITLE II

Although the copyright infringement liability of on-line and Internet service providers (OSPs and ISPs) is not expressly addressed in the actual provisions of the WIPO treaties, the Committee is sympathetic to the desire of such service providers to see the law clarified in this area. There have been several cases relevant to service provider liability for copyright infringement.<sup>20</sup> Most have approached the issue from the standpoint of contributory and vicarious liability. Rather than embarking upon a wholesale clarification of these doctrines, the Committee decided to leave current law in its evolving state and, instead, to create a series of "safe harbors," for certain common activities of service providers. A service provider which qualifies for a safe harbor, receives the benefit of limited liability.

In the beginning, the Committee identified the following activities: (1) digital network communications, (2) system caching, (3) information stored on service providers, and (4) information location tools. In the end, Title II contains five general categories of activities, which are addressed in a newly created section 512 in Chapter 5 of the Copyright Act. This new section 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), 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.

<sup>20</sup>For example, *Religious Technology Center v. Netcom On-line Communications Services*, 907 F. Supp. 1361 (N.D. Cal. 1995); *Playboy Enterprises v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993); and *Marobie-FL v. Nat. Assn. Of Fire Equipment Distributors*, 983 F. Supp. 1167 (N.D. Ill. 1997).

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 (l). 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.

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

#### *Particular concerns of educational institutions*

At least two concerns have been raised concerning the applicability of section 512 to educational institutions, such as universities and libraries, when they act as on-line service providers. The first concerns the extent to which the knowledge of faculty members using the Internet will be imputed to a college or university as a whole or the specific department within the college or university responsible for providing Internet service. To the extent such knowledge is imputed, the on-line service provider might fail to qualify for certain of the exceptions to liability included in this section. This is one of the specific questions upon which the Copyright Office study authorized in section 204 of this Act will focus. Without prejudging any issues to be considered in that study, it seems that the extent to which knowledge is imputed to the service provider in the case of colleges and universities, and in other settings in which the service provider and end-user share an employee-employer or other relationship, is a matter of the relevant State law of respondeat superior, rather than a matter of Federal copyright law. As a consequence, there may be much that a non-profit educational institution can do to structure the internal relationships between its faculty and its online service provider functions. What is more, nothing in this Act should be read to preclude a Federal court from taking into account the special circumstances of a non-profit educational institution in applying agency law to determine whether knowledge should be imputed to such an institution in its capacity as an online service provider.

The second concern raised about the applicability of section 512 to public universities and libraries, and indeed other public entities which operate as online service providers, is that by complying with the notice and take-down provisions of section 512, the public entities might violate the due process rights of their users. Any such due process objection suffers at least two flaws. In the first place, a prerequisite to any due process claim is a state law prop-

erty interest. In the case of the relatively new concept of Internet access, the service provider contract, rather than any common law property interest, would appear to be the yardstick of the Internet user's property interest in continued access. The contract for Internet service, therefore, can limit any property interest that would form the basis for a procedural due process claim. Second, and even more important, the procedural protections afforded by the notification requirements of subsection 512(c)(3) and the provisions for the replacement of removed or disabled materials in subsection 512(f) provide all the process that is due. The Committee was acutely concerned that it provide all end-users—whether contracting with private or public sector online service providers—with appropriate procedural protections to ensure that material is not disabled without proper justification. The provisions in the bill balance the need for rapid response to potential infringement with the end-users legitimate interests in not having material removed without recourse.

In order to explore these and other issues more fully, the Committee provides in section 204 for a study to be conducted by the Register of Copyrights.

### TITLE III

#### *Computer maintenance or repair*

Title III of the bill amends section 117 of the Copyright Act (17 U.S.C. 117) to ensure that independent service organizations do not inadvertently become liable for copyright infringement merely because they have turned on a machine in order to service its hardware components.

When a computer is activated, that is when it is turned on, certain software or parts thereof (generally the machine's operating system software) is automatically copied into the machine's random access memory, or "RAM". During the course of activating the computer, different parts of the operating system may reside in the RAM at different times because the operating system is sometimes larger than the capacity of the RAM. Because such copying has been held to constitute a "reproduction" under section 106 of the Copyright Act (17 U.S.C. 106),<sup>21</sup> a person who activated the machine without the authorization of the copyright owner of that software could be liable for copyright infringement. This legislation has the narrow and specific intent of relieving independent service providers, persons unaffiliated with either the owner or lessee of the machine, from liability under the Copyright Act when, solely by virtue of activating the machine in which a computer program resides, they inadvertently cause an unauthorized copy of that program to be made.

This title is narrowly crafted to achieve the foregoing objective without prejudicing the rights of copyright owners of computer software. Thus, for example, 1201(k) does not relieve from liability persons who make unauthorized adaptations, modifications, or other changes to the software. This title also does not relieve from liabil-

<sup>21</sup> See *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 671 (1994).



ity persons who make any unauthorized copies of software other than those caused solely by activation of the machine.

#### TITLE IV

##### A. EPHEMERAL RECORDINGS

Section 401 of the bill amends section 112 of the Copyright Act 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"). The 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 nonsubscription broadcast transmissions, which are defined as those made by terrestrial broadcast stations licensed as such by the FCC. 17 U.S.C. 114(d)(1)(A)(iii) and (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 nonsubscription digital broadcasts permitted by the DPRA. The Committee has therefore changed the existing language of the ephemeral recording exemption (redesignated as 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 anticircumvention provisions that the bill adds as section 1201 of the Copyright Act. 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 section 1201(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 section 1201(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 section 1201(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 section 1201(a)(1) if it engaged in activities prohibited by that section in other than the limited circumstances permitted by section 112(a)(1).

#### B. DISTANCE EDUCATION

New technology, especially digital technology, is increasingly being used by educational institutions in their distance learning programs. In the past, distance learning programs were developed primarily for students who, because of their special circumstances, could not be taught in a traditional classroom. Section 110(2) of the copyright law contains an exemption that accommodates this type of activity. The current exemption is designed to cover instructional broadcasting, and allows the use of only certain categories of works. Future distance education, however, may involve a wider range of activities, including the use of interactive digital transmissions, and be designed for a broader audience of students working from personal computers in their own homes.

The Committee believes that the scope of the distance education exemption should be re-examined in light of the range of educational activities made possible by digital technologies. The Committee therefore initiated discussions on distance learning with representatives of libraries, educational institutions and copyright owners, and asked the Register of Copyrights to recommend any appropriate legislative language for an updated distance education exemption. In response to this request by Chairman Hatch, Senator Leahy and Senator Ashcroft, the Register reported the conclusion that digital distance education is an evolving field, and the range of activities contemplated is diverse and potentially far-reaching in impact and scope.

In light of the complexity, importance and potential scope of the issues implicated by distance education, the Committee has determined that further study of the issues would be useful. The Committee therefore has directed the Copyright Office to provide Congress with a report recommending ways to promote distance learning through digital technologies no later than six months after enactment of this legislation. In conducting this study, the Copyright Office is required to consult with representatives of copyright owners, nonprofit educational institutions, libraries and archives. The Committee anticipates that the Copyright Office will also consult with others with relevant expertise, where appropriate, such as the Department of Education.

The Committee underscores the importance to the public of a speedy resolution of any copyright issues associated with distance learning and commits itself to developing a fair and effective distance learning regime promptly after receipt of the Register's Report.

#### *Fair use*

The bill does not amend section 107 of the Copyright Act, the fair use provision. The Committee determined that no change to section 107 was required because section 107, as written, is technologically

neutral, and therefore, the fair use doctrine is fully applicable in the digital world as in the analog world.

#### C. EXEMPTION FOR LIBRARIES AND ARCHIVES

Section 108 of title 17 permits libraries and archives of the type described in that section to make and, in some cases, distribute a limited number of copies of certain types of copyrighted works, without the permission of the copyright holder, for specified purposes relating to these entities' functions as repositories of such works for public reference. Section 403 of the bill updates section 108 to allow these entities to take advantage of digital technologies when engaging in specified preservation activities.

#### IV. VOTE OF THE COMMITTEE

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each Committee is to announce the results of rollcall votes taken in any meeting of the Committee on any measure or amendment. The Senate Committee on the Judiciary, with a quorum present, met on Thursday, April 23, 1998, at 10 a.m., to consider the Digital Millennium Copyright Act of 1998. The Committee considered and accepted the following three amendments en bloc, by unanimous consent: an amendment by the Chairman (for himself, Mr. Leahy, and Mr. Ashcroft), with respect to reverse engineering of computer programs for interoperability purposes; an amendment by the Chairman (for himself, Mr. Leahy and Mr. Ashcroft), with respect to ephemeral recordings; and, an amendment by Mr. Ashcroft (for himself, Mr. Leahy, and Mr. Hatch), with respect to the exemption from copyright infringement liability for libraries and archives.

The Committee, with a quorum present, met to resume consideration of the Digital Millennium Copyright Act on Thursday, April 30, 1998, at 10 a.m. The Committee considered and accepted the following amendments en bloc, by unanimous consent: an amendment by the Chairman (for himself, Mr. Leahy, and Mr. Ashcroft), with respect to ephemeral recordings; an amendment by the Chairman (for himself, Mr. Leahy, and Mr. Ashcroft), with respect to the use of copyright management information in the course of certain analog and digital transmissions; an amendment by the Chairman (for himself and Mr. Leahy), to make certain clarifying amendments; an amendment by Mr. Ashcroft (for himself, Mr. Leahy, and Mr. Hatch), with respect to protection of subscribers of online and Internet service providers; an amendment by Mr. Ashcroft (for himself, Mr. Hatch, and Mr. Leahy), with respect to the accommodation of particular technological protection measures; an amendment by Mr. Ashcroft (for himself, Mr. Hatch, and Mr. Leahy), with respect to protection of personal privacy interests; an amendment by Mr. Ashcroft (for himself, Mr. Hatch, and Mr. Leahy), with respect to the preservation of the ability to control minors' access to material on the Internet; an amendment by Mr. Ashcroft (for himself, Mr. Leahy, and Mr. Hatch), with respect to distance education through digital technologies; an amendment by Mr. Grassley (for himself and Mr. Kyl), with respect to law enforcement and intelligence activities; and an amendment by Mrs. Feinstein, with re-

spect to the liability of nonprofit educational institutions for copyright infringement online. The Committee then ordered the Digital Millennium Copyright Act of 1998 reported favorably, as amended, with a recommendation that the bill do pass, by a rollcall vote of 18 yeas to 0 nays.

## YEAS

Thurmond (by proxy)  
Grassley (by proxy)  
Specter (by proxy)  
Thompson  
Kyl  
DeWine  
Ashcroft  
Abraham (by proxy)  
Sessions  
Leahy  
Kennedy  
Biden (by proxy)  
Kohl (by proxy)  
Feinstein  
Feingold  
Durbin (by proxy)  
Torricelli (by proxy)  
Hatch

## NAYS

## V. SECTION-BY-SECTION ANALYSIS

*Section 1. Short title*

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

*Section 2. Table of contents*

## TITLE I—WIPO TREATIES IMPLEMENTATION

*Section 101. Short title*

This Title may be cited as the "WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998."

*Section 102. Technical amendments*

To comply with the obligations of the WIPO Treaties, several technical amendments to the U.S. Copyright Act are necessary. These amendments are needed to ensure that works from countries that join the two new WIPO Treaties, including works in existence on the date each treaty becomes effective for the United States, will be protected in the United States on a formality-free basis, as required by the provisions of each treaty. Three sections of the Copyright Act require amendment: (1) section 104, which specifies the conditions on which works from other countries are protected in the United States; (2) section 104A, which restores protection to certain preexisting works from other countries that have fallen into the public domain in the United States; and (3) section 411(a), which makes copyright registration a precondition to bringing suit for infringement for some works. In addition, the amendments made to

these sections require some additions to, and changes in, the definition section of the Copyright Act, section 101.

*Subsection (a)—Amendments to Section 101: Definitions.*—The bill amends section 101 of the Copyright Act (17 U.S.C. 101) to define “treaty party” as “any country or intergovernmental organization that is a party to an international agreement” and to define “international agreement” to include, *inter alia*, the two new WIPO Treaties. Definitions of the two new WIPO Treaties are also provided. In addition, a definition of “United States work” was added for purposes of section 411 of the Copyright Act (17 U.S.C. 411), as amended by the bill.

*Subsection (b)—Amendments to Section 104: Subject Matter of Copyright: National Origin.*—Section 104 of the Copyright Act (17 U.S.C. 104) identifies the criteria that must be met for a work to qualify for protection under the U.S. copyright law (i.e., “points of attachment”). Among those protected under section 104 are nationals or domiciliaries of those countries with which we have an appropriate treaty relationship. Section 104, as it is presently written, explicitly identifies those treaty relationships, but does not refer to the two new WIPO Treaties. Therefore, section 104 needs to be amended to provide for points of attachment for the two new WIPO Treaties.

Subsection (b) amends section 104 so that all countries that have copyright relations with the United States would be referred to collectively by the term “treaty parties.” This change, in conjunction with the amendments to section 101, which define “treaty party” and “international agreement,” serves to ensure that the two new WIPO Treaties are covered by section 104. This subsection also amends section 104 to extend protection to foreign works from any treaty party based on four points of attachment: nationality of the author, place of first publication of the work, place of fixation of the sounds embodied in a sound recording, and the situs of a constructed architectural work.

The way section 104 is presently written requires that it be amended each time U.S. treaty membership changes. By defining “treaty party” in section 101 and amending section 104 to refer to “treaty party,” future changes in the treaties to which the U.S. is a party would not require changes to section 104. It is much clearer and less unwieldy to have a single set of criteria for eligibility in section 104 as proposed by this bill, rather than multiple, overlapping criteria in a long list of complex definitions in section 101. If the U.S. joins any future treaties, those treaties can simply be added to the list of “international agreements” without any detailed amendments repeating the criteria for eligibility. The amendment to section 104 also makes clear that membership in the Geneva Phonograms Convention and the WIPO Performances and Phonograms Treaty provides national eligibility for sound recordings only, not other types of works.

*Subsection (c)—Amendments to Section 104A: Copyright in Restored Works.*—Subsection (c) amends section 104A(h) of the Copyright Act (17 U.S.C. 104A(h)) by adding the two new WIPO Treaties to the definitions of “date of adherence or proclamation” and “eligible country.” It would also add a paragraph to the definition of “restored work” to ensure that copyrighted works other than

sound recordings do not qualify as restored works where the sole basis for protection in the United States is adherence to the WIPO Performances and Phonograms Treaty.

*Subsection (d)—Amendments to Section 411(a): Registration and Infringement Actions.*—In its current form, section 411(a) of the Copyright Act (17 U.S.C. 411(a)) requires works to be registered with the Copyright Office before suit can be brought for their infringement, but exempts Berne Convention works whose country of origin is not the United States. Subsection (d) amends section 411(a) of the Copyright Act to include works from members of the two new WIPO Treaties within the exemption.

The amendments made by subsection (d) reframe the registration requirement in the affirmative—essentially the converse of the current section 411(a). In other words, the provision would state affirmatively that “United States works” must be registered before suit. Rather than frame an exemption from that requirement for certain works whose origin is *not* the United States, section 411(a) would, as amended by this subsection, merely limit the requirement of registration as a precondition to suit to those works whose country of origin is the United States. “United States works” are defined in section 101 of the Copyright Act (17 U.S.C. 101), as amended by this Title. As discussed with respect to the amendments in subsection (b) to section 104 of the Copyright Act, section 411(a), as amended by this subsection, may be easily updated each time the United States joins another treaty, without the need to change several interrelated provisions of the Act.

*Subsection (e)—Amendment to section 507(a).*—Section 507(a) of the Copyright Act (17 U.S.C. 507(a)) provides for a 3-year statute of limitations period for all criminal copyright actions. Subsection (e) amends section 507(a) to recognize exceptions to the 3-year limitations period if expressly provided elsewhere in title 17. This amendment is necessary in light of the 5-year criminal limitation period contained in the new chapter 12 of title 17, which is created by this title.

*Section 103. Copyright protection systems and copyright management information*

The two new WIPO Treaties include substantively identical provisions on technological measures of protection (also commonly referred to as the “black box” or “anticircumvention” provisions). These provisions require contracting parties to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

Both of the new WIPO treaties also include substantively identical provisions requiring contracting parties to protect the integrity of copyright management information. The treaties define copyright management information as “information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information,

when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.'

Legislation is required to comply with both of these provisions. To accomplish this, the bill adds a new chapter (chapter twelve) to title 17 of the United States Code. This new chapter twelve includes five sections—(1) section 1201, which prohibits the circumvention of technological copyright protection measures; (2) section 1202, which protects the integrity of copyright management information; (3) section 1203, which provides for civil remedies for violations of sections 1201 and 1202; (4) section 1204, which provides for criminal penalties for violations of sections 1201 and 1202; and (5) section 1205, which provides a savings clause to preserve the effectiveness of federal and state laws in protecting individual privacy on the Internet.

*Section 1201. Circumvention of copyright protection systems*

*Subsection (a)—Violations regarding circumvention of technological protection measures.*—Subsection (a) applies when a person has not obtained authorized access to a copy or a phonorecord of a work that is protected under the Copyright Act and for which the copyright owner has put in place a technological measure that effectively controls access to his or her work. The relevant terminology is defined in paragraph (a)(3), as described below.

Paragraph (a)(1) establishes a general prohibition against gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a work protected under title 17 of the U.S. Code. This paragraph does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under title 17, even if such actions involve circumvention of other types of technological protection measures.

In order to provide meaningful protection and enforcement of the copyright owner's right to control access to his or her copyrighted work, paragraph (a)(2) supplements the prohibition against the act of circumvention in paragraph (a)(1) with prohibitions on creating and making available certain technologies, products and services used, developed or advertised to defeat technological protections against unauthorized access to a work. Similar laws have been enacted in related contexts. See, e.g., 17 U.S.C. 1002(a) (prohibiting the import, manufacture, or distribution of digital audio recording equipment lacking specified characteristics and prohibiting the import, manufacture, or distribution of any device, or the offer to perform any service, the primary purpose or effect of which is to circumvent the serial copy management system required for digital audio equipment); 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.)

Specifically, paragraph (a)(2) prohibits 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 work protected under title 17. It is drafted carefully to target "black boxes," and to ensure that legitimate multipurpose devices can continue to be made and sold. 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 work protected under title 17. This provision is designed to protect copyright owners, and simultaneously allow the development of technology.

Paragraph (a)(3) defines certain terms used throughout paragraph (a). Subparagraph (1) 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 paragraph (a) only, which covers protections against unauthorized initial access to a copyrighted work. Subparagraph (2) 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.

*Subsection (b)—Additional violations.*—Subsection (b) applies to those technological measures employed by a copyright owner that effectively protect his or her copyright rights in a work, as opposed to those technological protection measures covered by subsection (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. It is anticipated that most acts of circumventing a technological copyright protection measure will occur in the course of conduct which itself implicates the copyright owners rights under title 17. This subsection is not intended in any way to enlarge or diminish those rights. Thus, for example, where a copy control technology is employed to prevent the unauthorized reproduction of a work, the circumvention of that technology would not itself be actionable under section 1201, but any reproduction of the work that is thereby facilitated would remain subject to the protections embodied in title 17.

Paralleling paragraph (a)(2), above, paragraph (b)(1) seeks to provide meaningful protection and enforcement of copyright owners' use of technological protection measures to protect their rights under title 17 by prohibiting the act of making or selling the technological means to overcome these protections and thereby facilitate copyright infringement. Paragraph (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 under title 17 in a work or portion thereof. 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 under title 17 in a work or a portion thereof. Like paragraph (a)(2), this provision is designed to protect copyright owners, and simultaneously allow the development of technology.

Paragraph (b)(2) defines certain terms used in subsection (b). Subparagraph (b)(2)(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)(2)(B) provides that a technological protection measure "effectively protects a right of a copyright owner under title 17" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right under Title 17 of a copyright owner.

*Subsection (c)—Importation.*—Subsection (c) prohibits the importation, sale for importation, or sale within the United States after importation by the owner, importer or consignee of any technology, product, service, device, component, or part thereof covered by subsections (a) or (b). This paragraph further provides that violations of this provision are actionable under section 337 of the Tariff Act (19 U.S.C. 1337), which authorizes actions by the International Trade Commission against unfair import practices.

*Subsection (d)—Other rights, etc., not affected.*—Subsection (d) sets forth several provisions clarifying the scope of section 1201. Paragraph (d)(1) provides that section 1201 shall not have any effect on rights, remedies, limitations, or defenses to copyright infringement, including fair use, under title 17. Paragraph (d)(2) provides that section 1201 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. Together, these provisions are intended to ensure that none of the provisions in section 1201 affect the existing legal regime established in the Copyright Act and case law interpreting that statute.

Paragraph (d)(3) clarifies that nothing in section 1201 creates a mandate requiring manufacturers of consumer electronics, telecommunications, and computing products to design their products or their parts and components to respond to any particular technological measure employed to protect a copyrighted work. The provision also makes clear, however, that while the failure of a product to respond to a particular technological measure does not in and of itself create liability, neither does the failure of the product to re-

spond to a particular technological protection measure immunize those trafficking in the product from liability under section 1201(a)(2) or (b), if the tests of liability in those provisions are met.

*Subsection (e)—Exemption for nonprofit libraries, archives, and educational institutions.*—Subsection (e) provides a limited exemption from the prohibition on circumvention of technological protection measures contained in section 1201(a)(1) for qualified nonprofit libraries, archives, and educational institutions.

Paragraph (1) of this subsection 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 conduct permitted under the Copyright Act, such as a fair use under section 107. 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.

Paragraph (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.

Paragraph (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 1201(a) by gaining access to a commercially exploited copyrighted work and willfully and for the purpose of commercial advantage or financial gain failing to comply with the provisions of paragraph (1)(A) (requiring that a qualifying library, archive, or educational institution not retain the work for longer than necessary to make a good faith determination as to whether to acquire a copy or portion of the work) or paragraph (1)(B) (requiring that a qualifying library, archive, or educational institution not use the work to which it has gained access for any purpose other than to make a good faith determination as to whether to acquire a copy or portion of the work). Under this paragraph, a violator shall be subject to civil remedies under section 1203 for the first time it gains access in violation of section 1201(a) without complying with the requirements of paragraph (1). For subsequent offenses, the violator shall not only be subject to civil remedies under section 1203, but also lose the benefit of the exemption provided by this subsection.

Paragraph (4) provides that this subsection may not be used as a defense to the prohibitions on manufacturing or selling devices contained in sections 1201(a)(2) or 1202(b).

Finally, paragraph (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.

*Subsection (f)—Law enforcement and intelligence activities.*—Subsection (f) creates an exception for the lawfully authorized inves-

tigative, 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. This exception will protect officers, agents, employees, or contractors of, or other persons acting at the direction of, a law enforcement or intelligence agency of the United States, a State, or a political subdivision of a State, who are performing lawfully authorized investigative, protective, or intelligence activities. This exception will also protect officers, agents, employees, or contractors of, or other persons acting at the direction of, elements or divisions of an agency or department of the United States, a State, or a political subdivision of a State, which does not have law enforcement or intelligence as its primary function, but who may nevertheless, in the course of lawfully authorized protective, intelligence, or criminal investigative activities, engage in actions otherwise prohibited by this bill. This exception only applies to individuals covered under this section when they are performing investigative, protective, or intelligence activities, within the scope of their duties and in furtherance of lawfully authorized activities.

*Subsections (g)-(j)—Interoperability of computer programs.*—Subsections (g) through (j) are intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability to the extent permitted by law prior to the enactment of this chapter. The objective is to ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs. See, *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 24 U.S.P.Q.2d 1561 (9th Cir. 1992.). The purpose of this section is to foster competition and innovation in the computer and software industry.

Subsection (g) permits the circumvention of access control technologies for the sole purpose of achieving software interoperability. For example, this subsection permits a software developer to circumvent an access control technology applied to a portion or portions of a program in order to perform the necessary steps to identify and analyze the information necessary to achieve interoperability. Subsection (g) permits the act of circumvention in only certain instances. First, the copy of the computer program which is the subject of the analysis must be lawfully acquired. That is 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. The permitted acts must be limited to those elements of the program which must be analyzed to achieve the sole permitted purpose, which is interoperability of an independently created program with other programs. Interoperability is defined in subsection (j) as the ability of computer programs to exchange information, and for such programs mutually to use the information which has been exchanged. The resulting product must be a new and original work, in that it may not infringe the original computer program. In addition, 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.

Subsection (h) recognizes that to accomplish the acts permitted under subsection (g) a person may, in some instances, have to make and use certain tools. In most instances these will be generally available tools that programmers use in developing computer programs, such as compilers, trace analyzers and disassemblers, which are not prohibited by this section. In certain instances, it is possible that a person may have to develop special tools to achieve the permitted purpose of interoperability. Thus, this provision creates an exception to the prohibition on making circumvention tools contained in subsections 1201(a)(2) and (b). These tools can be either software or hardware. Again, this provision is limited by a general admonition not to act in a way that constitutes infringing activity.

Subsection (i) 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. This subsection 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. Recognizing, however, that making such circumvention information or tools generally available would undermine the objectives of this Act, this section imposes strict limitations. Such 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, that action is a violation of this Act. In addition, these acts are permitted only to the extent that doing so does not constitute infringement under this title, or violate applicable law other than this title.

Subsection (j) 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 creating such an interoperable independently created program. This provision 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. Accordingly, since the goal of interoperability is the touchstone of the exceptions contained in subsections 1201(g) through (j), 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.

*Subsection (k).*—The Committee was concerned that section 1201(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. Subsection (k) addresses these concerns.

*Section 1202: Integrity of copyright management information*

Section 1202 implements the obligation contained in Article 12 of the WIPO Copyright Treaty and Article 19 of the WIPO 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 communicates to the public, works or copies of works knowing that such information has been removed or altered without authority.<sup>22</sup> This section does not mandate the use of CMI, nor does it prescribe the choice of any particular type of CMI for those who do use it. It merely protects the integrity of CMI if a party chooses to use it in connection with a copyrighted work by prohibiting its deliberate deletion or alteration. Furthermore, this section imposes liability for specified acts. It does not address the question of liability for persons who manufacture devices or provide services.

*Subsection (a)—False copyright management information.*—Subsection (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. There are two prerequisites that must be met for these prohibitions to be violated:

<sup>22</sup> Article 12 of the WIPO Copyright Treaty provides:

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

(i) to remove or alter any electronic rights management information without authority,  
(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of the work to the public.

Article 19 of the WIPO Performances and Phonograms Treaty provides:

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

(i) to remove or alter any electronic rights management information without authority,  
(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

### VIII. ADDITIONAL VIEWS OF MR. LEAHY

The successful adoption by the World Intellectual Property Organization (WIPO) in December 1996 of two new copyright treaties—one on written material and one on sound recordings—was appropriately lauded in the United States. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty will give a significant boost to the protection of intellectual property rights around the world, and stand to benefit important American creative industries—from movies, recordings, computer software and many other copyrighted materials that are subject to piracy online.

According to Secretary Daley of the Department of Commerce, for the most part, “the treaties largely incorporate intellectual property norms that are already part of U.S. law.” What the treaties will do is give American owners of copyrighted material an important tool to protect their intellectual property in those countries that become a party to the treaties. With an ever-expanding global marketplace, such international protection is critical to protect American companies and, ultimately, American jobs and the U.S. economy.

The President submitted the two WIPO treaties to the U.S. Senate on July 29, 1997, as well as draft legislation to implement the two treaties. I was proud to introduce this draft implementing legislation, S. 1121, with Senators Hatch, Thompson, and Kohl on July 29, 1997.

This legislation is the culmination of an effort to ensure that the appropriate copyright protections are in place around the world to foster the enormous growth of the Internet and other digital computer networks. Our dependence on interconnected computers only grows as a means to communicate, manage our personal and business affairs and obtain the goods and services we want. Indeed, computer networks will increasingly become the means of transmitting copyrighted works in the years ahead. This presents great opportunities but also poses significant risks to authors and our copyright industries.

We must make sure that our copyright laws protect the intellectual property rights of creative works available online in ways that promote the use of the Internet, both by content providers and users. The future growth of computer networks like the Internet and of digital, electronic communications requires it. Otherwise, owners of intellectual property will be unwilling to put their material online. If there is no content worth reading online, the growth of this medium will be stifled, and public accessibility will be retarded.

The Clinton administration showed great foresight when it formed, in 1993, the Information Infrastructure Task Force (IITF), which in turn established the Working Group on Intellectual Property Rights to examine and recommend changes to keep copyright

law current with new technology. In 1995, the Administration's Working Group on Intellectual Property Rights released its report, "Intellectual Property and the National Information Infrastructure," in which it explained the importance of adequate copyright protection for the future of the Internet:

The full potential of the NII will not be realized if the education, information and entertainment products protected by intellectual property laws are not protected effectively when disseminated via the NII. Creators and other owners of intellectual property will not be willing to put their interests at risk if appropriate systems—both in the U.S. and internationally—are not in place to permit them to set and enforce the terms and conditions under which their works are made available in the NII environment. Likewise, the public will not use the services available on the NII and generate the market necessary for its success unless a wide variety of works are available under equitable and reasonable terms and conditions, and the integrity of those works is assured. All the computers, telephones, fax machines, scanners, cameras, keyboards, televisions, monitors, printers, switches, routers, wires, cables, networks, and satellites in the world will not create a successful NII, if there is no content. What will drive the NII is the content moving through it.

The same year that report was issued, Senator Hatch and I joined together to introduce "The NII Copyright Protection Act of 1995", S. 1284, which incorporated the recommendations of the Administration. That legislative proposal confronted fundamental questions about the role of copyright in the next century—many of which are echoed by the Digital Millennium Copyright Act (DMCA), which was reported by the Senate Judiciary Committee.

I note that the Report of the Administration's Working Group on Intellectual Property also generally supported "the amendments to the copyright law and the criminal law (which sets out sanctions for criminal copyright violations) set forth in S. 1122, introduced in the 104th Congress by Senators Leahy and Feingold following consultations with the Justice Department." While the 104th Congress did not act on this legislation, I revised and reintroduced this bill as S. 1044 in 1997. This important legislation, the No Electronic Theft Act, to adapt to the emerging digital environment was finally enacted in this Congress.

Title I of the DMCA is based on the administration's recommendations for legislation to implement the two WIPO treaties, as reflected in S. 1121. In sum, Title I makes certain technical changes to conform our copyright laws to the treaties and substantive amendments to comply with two new treaty obligations. Specifically, the treaties oblige the signatories to provide legal protections against circumvention of technological measures used by copyright owners to protect their works, and against violations of the integrity of copyright management information (CMI), which identifies a work, its author, the copyright owner and any information about the terms and conditions of use of the work. The bill adds a new chapter to U.S. copyright law to implement the

anticircumvention and CMI provisions, along with corresponding civil and criminal penalties. Title II of the DMCA provides limitations, under certain conditions, on copyright infringement liability for Internet service providers (ISP's) and online service providers (OSP's). Title III provides a statutory exemption in the Copyright Act to ensure that the lawful owner or lessee of a computer machine may authorize an independent service technician to activate the computer in order to service its hardware components. Title IV begins the process of updating our Nation's copyright laws with respect to library, archives, and educational uses of copyrighted works in the digital age.

Following intensive discussions with a number of interested parties, including libraries, universities, small businesses, ISP's and OSP's, telephone companies, computer users, broadcasters, content providers and device manufacturers, the Senate Judiciary Committee was able to reach unanimous agreement on certain modifications and additions incorporated into the DMCA.

For example, significant provisions were added to the bill in Title II to clarify the liability for copyright infringement of online and Internet service providers. These provisions set forth "safe harbors" from liability for ISP's and OSP's under clearly defined circumstances, which both encourage responsible behavior and protect important intellectual property rights. In addition, during the Committee's consideration of this bill, an Ashcroft-Leahy-Hatch amendment was adopted to ensure that computer users are given reasonable notice of when their Web sites are the subject of infringement complaints, and to provide procedures for computer users to have material that is mistakenly taken down put back online.

This bill contains a number of provisions designed to help libraries and archives. First, libraries expressed concerns about the possibility of criminal sanctions or potentially ruinous monetary liability for actions taken in good faith. This bill makes sure that libraries acting in good faith can never be subject to fines or civil damages. Specifically, a library is exempt from monetary liability in a civil suit if it was not aware and had no reason to believe that its acts constituted a violation. In addition, libraries are completely exempt from the criminal provisions.

Second, the bill contains a "browsing" exception for libraries. Libraries have indicated that in an online environment dominated by encrypted works it may be impossible for them to gain access to works to decide whether or not to acquire them. The current version of the bill permits libraries to disregard access prevention technologies in order to make a good faith determination of whether or not it would like to buy a copy of a work. If the library decides that it wishes to acquire the work it must negotiate with the copyright owner just as libraries do today.

Third, Senator Hatch, Senator Ashcroft, and I crafted an amendment to provide for the preservation of digital works by qualified libraries and archives. The ability of libraries to preserve legible copies of works in digital form is one I consider critical. Under present law, libraries are permitted to make a single facsimile copy of works in their collections for preservation purposes, or to replace lost, damaged or stolen copies of works that have become commercially unavailable. This law, however, has become outmoded by



changing technology and preservation practices. The bill ensures that libraries' collections will continue to be available to future generations by permitting libraries to make up to three copies in any format—including in digital form. This was one of the proposals in The National Information Infrastructure (NII) Copyright Protection Act of 1995, which I sponsored in the last Congress. The Register of Copyrights, among others, has supported that proposal.

In addition, the bill would permit a library to transfer a work from one digital format to another if the equipment needed to read the earlier format becomes unavailable commercially. This change addresses a problem that should be familiar to anyone whose office has boxes of eight-inch floppy disks tucked away somewhere.

These provisions go a long way toward meeting the concerns that libraries have expressed about the original bill, S. 1121.

Another issue that the bill addresses is distance learning. When Congress enacted the present copyright law it recognized the potential of broadcast and cable technology to supplement classroom teaching, and to bring the classroom to those who, because of their disabilities or other special circumstances, are unable to attend classes. At the same time, Congress also recognized the potential for unauthorized transmissions of works to harm the markets for educational uses of copyrighted materials. In the present Copyright Act, we struck a careful balance and crafted a narrow exemption. But as with so many areas of copyright law, the advent of digital technology requires us to take another look at the issue.

I recognize that the issue of distance learning has been under consideration for the past several years by the Conference on Fair Use (CONFU) that was established by the administration to consider issues relating to fair use in the digital environment. In spite of the hard work of the participants, CONFU has so far been unable to forge a comprehensive agreement on guidelines for the application of fair use to digital distance learning.

We made tremendous strides in the Committee to chart the appropriate course for updating the Copyright Act to permit the use of copyrighted works in valid distance learning activities. Senator Hatch, Senator Ashcroft, and I joined together to ask the Copyright Office to facilitate discussions among interested library and educational groups and content providers with a view toward making recommendations that could be incorporated into the DMCA at the April 30 markup.

Based on the Copyright Office's recommendations, we incorporated into the DMCA a new section 122 requiring the Copyright Office to make broader recommendations to Congress on digital distance education within six months. Upon receiving the Copyright Office's recommendations, it is my hope that the Senate Judiciary Committee will promptly commence hearings on the issue and move expeditiously to enact further legislation on the matter. I know that all members on this Committee are as anxious as I am to complete the process that we started in Committee of updating the Copyright Act to permit the appropriate use of copyrighted works in valid distance learning activities. This step should be viewed as a beginning—not an end, and we are committed to reaching that end point as quickly as possible.

Senator Feinstein had sought to clarify when a university would be held responsible for the actions of its employees in connection with its eligibility for the safe harbors spelled out in title II of the bill. I and others on the Committee agreed with Senator Feinstein that, because of the importance, complexity, and implications for other online service providers, including libraries and archives of this issue, we should have the Copyright Office examine the issue in a comprehensive fashion as well.

Amendments sponsored by Senator Ashcroft, Senator Hatch, and I were also crafted to address the issues of reverse engineering, ephemeral recordings and to clarify the use of copyright management information in the course of certain analog and digital transmissions in broadcasting. Additional legislative language was incorporated into the bill to clarify that the law enforcement exemptions apply to all government agencies which conduct law enforcement and intelligence work, as well as to government contractors engaging in intelligence, investigative, or protective work.

Finally, to assuage the concerns of the consumer electronics manufacturers and others that the bill might require them to design their products to respond to any particular technological protection measure, Senator Hatch, Senator Ashcroft, and I crafted an amendment that clarified the bill on this issue. We also agreed to incorporate provisions into the bill clarifying that nothing in the bill will prevent parents from controlling their children's access to the Internet or individuals from protecting personal identifying information.

The DMCA is a product of the Senate Judiciary Committee's recognition that ours is a time of unprecedented challenge to copyright protection. Copyright has been the engine that has traditionally converted the energy of artistic creativity into publicly available arts and entertainment. Historically, the Government's role has been to encourage creativity and innovation by protecting copyrights that create incentives for the dissemination to the public of new works and forms of expression. That is the tradition which I have sought to honor and which I intend to continue to promote.

Now, with the DMCA, the Senate Judiciary Committee takes another important step toward protecting American ingenuity and creative expression. This bill is a well-balanced package of proposals that address the needs of creators, consumers and commerce in the digital age and well into the next century.

PATRICK LEAHY.

DIGITAL MILLENNIUM COPYRIGHT ACT

OCTOBER 8, 1998.—Ordered to be printed

Mr. COBLE, from the committee of conference,  
submitted the following

CONFERENCE REPORT

[To accompany H.R. 2281]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to 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, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

**SECTION 1. SHORT TITLE.**

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

**SEC. 2. TABLE OF CONTENTS.**

*Sec. 1. Short title.*

*Sec. 2. Table of contents.*

**TITLE I—WIPO TREATIES IMPLEMENTATION**

*Sec. 101. Short title.*

*Sec. 102. Technical amendments.*

*Sec. 103. Copyright protection systems and copyright management information.*

*Sec. 104. Evaluation of impact of copyright law and amendments on electronic commerce and technological development.*

*Sec. 105. Effective date.*

**TITLE II—ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION**

*Sec. 201. Short title.*

*Sec. 202. Limitations on liability for copyright infringement.*

*Sec. 203. Effective date.*

69-006

## JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to 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, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment that is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes.

### TITLE I—WIPO TREATIES IMPLEMENTATION

This title implements two new intellectual property treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, signed in Geneva, Switzerland in December 1996.

#### SECTION 101 . SHORT TITLE

The House recedes to the Senate section 101. This section sets forth the short title of the Act. As between the short titles in the House bill and the Senate amendment, it is believed that the title in Section 101 of the Senate amendment more accurately reflects the effect of the Act.

#### SECTION 102 . TECHNICAL AMENDMENTS

The Senate recedes to House section 102. This section makes technical and conforming amendments to the U.S. Copyright Act in order to comply with the obligations of the two WIPO treaties.

#### SECTION 103 . COPYRIGHT PROTECTION SYSTEMS AND COPYRIGHT MANAGEMENT INFORMATION

The Senate recedes to House section 103 with modification. The two new WIPO Treaties include substantively identical provisions on technological measures of protection (also commonly referred to as the "black box" or "anticircumvention" provisions). These provisions require contracting parties to provide "adequate

(63)

legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

Both of the new WIPO treaties also include substantively identical provisions requiring contracting parties to protect the integrity of copyright management information. The treaties define copyright management information as "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

Legislation is required to comply with both of these provisions. To accomplish this, both the House bill and the Senate amendment, in section 103, would add a new chapter (chapter twelve) to title 17 of the United States Code. This new chapter twelve includes five sections—(1) section 1201, which prohibits the circumvention of technological measures of protection; (2) section 1202, which protects the integrity of copyright management information; (3) section 1203, which provides for civil remedies for violations of sections 1201 and 1202; (4) section 1204, which provides for criminal penalties for violations of sections 1201 and 1202; and (5) section 1205, which provides a savings clause to preserve the effectiveness of federal and state laws in protecting individual privacy on the Internet. The House bill and the Senate amendment differ in several respects, primarily related to the scope and availability of exemptions from the prohibitions under section 1201.

*Section 1201(a)(1)—Rulemaking by the Librarian of Congress.* Section 1201(a)(1)(C) provides that the determination of affected classes of works described in subparagraph (A) shall be made by the Librarian of Congress "upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation." The determination will be made in a rulemaking proceeding on the record. It is the intention of the conferees that, as is typical with other rulemaking under title 17, and in recognition of the expertise of the Copyright Office, the Register of Copyrights will conduct the rulemaking, including providing notice of the rulemaking, seeking comments from the public, consulting with the Assistant Secretary for Communications and Information of the Department of Commerce and any other agencies that are deemed appropriate, and recommending final regulations in the report to the Librarian.

*Section 1201(a) and 1202—technological measures.* It is the understanding of the conferees that technological measures will most often be developed through consultative, private sector efforts by content owners, and makers of computers, consumer electronics and telecommunications devices. The conferees expect this consultative approach to continue as a constructive and positive method.

One of the benefits of such consultation is to allow testing of proposed technologies to determine whether there are adverse effects on the ordinary performance of playback and display equipment in the marketplace, and to take steps to eliminate or substantially mitigate those effects before technologies are introduced. The public interest is well-served by such activities.

Persons may also choose to implement a technological measure without vetting it through an inter-industry consultative process, or without regard to the input of affected parties. Under such circumstances, such a technological measure may materially degrade or otherwise cause recurring appreciable adverse effects on the authorized performance or display of works. Steps taken by the makers or servicers of consumer electronics, telecommunications or computing products used for such authorized performances or displays solely to mitigate these adverse effects on product performance (whether or not taken in combination with other lawful product modifications) shall not be deemed a violation of sections 1201(a) or (b).

However, this construction is not meant to afford manufacturers or servicers an opportunity to give persons unauthorized access to protected content, or to exercise the rights under the Copyright Act of copyright owners in such works, under the guise of "correcting" a performance problem that results from the implementation of a particular technological measure. Thus, it would violate sections 1201(a) or (b) for a manufacturer or servicer to take remedial measures if they are held out for or undertaken with, or result in equipment with only limited commercially significant use other than, the prohibited purpose of allowing users to gain unauthorized access to protected content or to exercise the rights under the Copyright Act of copyright owners in such works.

With regard to section 1202, product adjustments made to eliminate recurring appreciable adverse effects on the authorized performance or display of works caused by copyright management information will not be deemed a violation of section 1202 unless such steps are held out for or undertaken with a prohibited purpose, or the requisite knowledge, of inducing, enabling, facilitating or concealing infringement of rights of copyright owners under the Copyright Act.

*Section 1201(e) and 1202(d)—Law enforcement, intelligence, and other government activities.* Sections 1201(e) and 1202(d) create an exception to the prohibitions of sections 1201 and 1202 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. The anticircumvention provisions of this legislation might be read to prohibit some aspects of the information security testing that is critical to preventing cyber attacks against government computers, computer systems, and computer networks. The conferees have added language to sections 1201(e) and 1202(d) to make it clear that the anticircumvention prohibition does not apply to lawfully authorized information security activities of the federal government, the states, political subdivisions of states, or persons acting within the scope of their government information security contract. In this way, the bill will

permit the continuation of information security activities that protect the country against one of the greatest threats to our national security as well as to our economic security.

At the same time, this change is narrowly drafted so that it does not open the door to the very piracy the treaties are designed to prevent. For example, the term "information security" activities is intended to include presidential directives and executive orders concerning the vulnerabilities of a computer, computer system, or computer network. By this, the conferees intend to include the recently-issued Presidential Decision Directive 63 on Critical Infrastructure Protection. PDD-63 contains a number of initiatives to ensure that the United States takes all necessary measures to swiftly eliminate any significant vulnerability to both physical and cyber attacks on the nation's critical infrastructures, including especially our cyber systems.

The Term "computer system" has the same definition for purposes of this section as that term is defined in the Computer Security Act, 15 U.S.C. § 278g-3(d)(1).

*Subsection 1201(g)—Encryption Research.* Subsection (g) permits the circumvention of access control technologies in certain circumstances for the purpose of good faith encryption research. The conferees note that section 1201(g)(3)(A) does not imply that the results of encryption research must be disseminated. There is no requirement that legitimate encryption researchers disseminate their findings in order to qualify for the encryption research exemption in section 1201(g). Rather, the subsection describes circumstances in which dissemination, if any, would be weighed in determining eligibility.

*Section 1201(j)—Security Testing.* Subsection (j) clarifies the intended effect of the bill with respect to information security. The conferees understand this act to prohibit unauthorized circumvention of technological measures applied to works protected under title 17. The conferees recognize that technological measures may also be used to protect the integrity and security of computers, computer systems or computer networks. It is not the intent of this act to prevent persons utilizing technological measures in respect of computers, computer systems or networks from testing the security value and effectiveness of the technological measures they employ, or from contracting with companies that specialize in such security testing.

Thus, in addition to the exception for good faith encryption research contained in Section 1201(g), the conferees have adopted Section 1201(j) to resolve additional issues related to the effect of the anti-circumvention provision on legitimate information security activities. First, the conferees were concerned that Section 1201(g)'s exclusive focus on encryption-related research does not encompass the entire range of legitimate information security activities. Not every technological means that is used to provide security relies on encryption technology, or does so to the exclusion of other methods. Moreover, an individual who is legitimately testing a security technology may be doing so not to advance the state of encryption research or to develop encryption products, but rather to ascertain the effectiveness of that particular security technology.

The conferees were also concerned that the anti-circumvention provision of Section 1201(a) could be construed to inhibit legitimate forms of security testing. It is not unlawful to test the effectiveness of a security measure before it is implemented to protect the work covered under title 17. Nor is it unlawful for a person who has implemented a security measure to test its effectiveness. In this respect, the scope of permissible security testing under the Act should be the same as permissible testing of a simple door lock: a prospective buyer may test the lock at the store with the store's consent, or may purchase the lock and test it at home in any manner that he or she sees fit—for example, by installing the lock on the front door and seeing if it can be picked. What that person may not do, however, is test the lock once it has been installed on someone else's door, without the consent of the person whose property is protected by the lock.

In order to resolve these concerns, Section 1201(j) creates an exception for "security testing." Section 1201(j)(1) defines "security testing" as obtaining access to a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting a security flaw or vulnerability, provided that the person engaging in such testing is doing so with the consent of the owner or operator of the computer, computer system, or computer network. Section 102(j)(2) provides that, notwithstanding the provisions of Section 1201(a), a person may engage in such testing, provided that the act does not constitute infringement or violate any other applicable law. Section 1201(j)(3) provides a non-exclusive list of factors that a court shall consider in determining whether a person benefits from this exception.

Section 1201(j)(4) permits an individual, notwithstanding the prohibition contained in Section 1201(a)(2), to develop, produce, distribute, or employ technological means for the sole purpose of performing acts of good faith security testing under Section 1201(j)(2), provided the technological means do not otherwise violate section 1201(a)(2). It is Congress' intent for this subsection to have application only with respect to good faith security testing. The intent is to ensure that parties engaged in good faith security testing have the tools available to them to complete such acts. The conferees understand that such tools may be coupled with additional tools that serve purposes wholly unrelated to the purposes of this Act. Eligibility for this exemption should not be precluded because these tools are coupled in such a way. The exemption would not be available, however, when such tools are coupled with a product or technology that violates section 1201(a)(2).

*Section 1201(k)—Certain Analog Devices and Certain Technological Measures.* The conferees included a provision in the final legislation to require that analog video cassette recorders must conform to the two forms of copy control technology that are in wide use in the market today—the automatic gain control copy control technology and the colorstripe copy control technology. Neither are currently required elements of any format of video recorder, and the ability of each technology to work as intended depends on the consistency of design of video recorders or on incorporation of specific response elements in video recorders. Moreover, they do not employ encryption or scrambling of the content being protected.



As a consequence, these analog copy control technologies may be rendered ineffective either by redesign of video recorders or by intervention of "black box" devices or software "hacks". The conferees believe, and specifically intend, that the general circumvention prohibition in Section 1201(b)(2) will prohibit the manufacture and sale of "black box" devices that defeat these technologies. Moreover, the conferees believe and intend that the term "technology" should be read to include the software "hacks" of this type, and that such "hacks" are equally prohibited by the general circumvention provision. Devices have been marketed that claim to "fix" television picture disruptions allegedly caused by these technologies. However, as described in more detail below, there is no justification for the existence of any intervention device to "fix" such problems allegedly caused by these technologies, including "fixes" allegedly related to stabilization or clean up of the picture quality. Such devices should be seen for what they are—circumvention devices prohibited by this legislation.

The conferees emphasize that this particular provision is being included in this bill in order to deal with a very specific situation involving the protection of analog television programming and prerecorded movies and other audiovisual works in relation to recording capabilities of ordinary consumer analog video cassette recorders. The conferees also acknowledge that numerous other activities are underway in the private sector to develop, test, and apply copy control technologies, particularly in the digital environment. Subject to the other requirements of this section, circumvention of these technologies may be prohibited under this Act. Moreover, in some cases, these technologies are subject to licensing arrangements that provide legally enforceable obligations. The conferees applaud these undertakings and encourage their continuation, including the inter-industry meetings and working groups that are essential to their success. If, as a result of such activities, the participants request further Congressional action, the conferees expect that the Congress, and the committees involved in this Conference specifically, will consider whether additional statutory requirements are necessary and appropriate.

Before agreeing to include this requirement in the final legislation, the conferees assured themselves in relation to two critical issues—that these analog copy control technologies do not create "playability" problems on normal consumer electronics products and that the intellectual property necessary for the operation of these technologies will be available on reasonable and non-discriminatory terms.

In relation to the playability issue, the conferees have received authoritative assurances that playability issues have already been resolved in relation to the current specifications for these technologies and that an inter-industry forum will be established to resolve any playability issues that may arise in the future in relation to either revisions to the copy control specifications or development of new consumer technologies and products.

As further explanation on the playability issue, the conferees understand that the existing technologies were the subject of extensive testing that included all or virtually all of the major consumer electronics manufacturers and that this testing resulted in modi-

fication of the specifications to assure that the technologies do not produce noticeable adverse effects on the normal display of content that is protected utilizing these technologies. Currently, all manufacturers are effectively "on notice" of the existence of these technologies and their specifications and should be able to design their products to avoid any adverse effects.

In relation to the intellectual property licensing issues, the owner of the analog copy control intellectual property—Macrovision Corporation—has written a letter to the Chairman of the Conference Committee to provide the following assurances in relation to the licenses for intellectual property necessary to implement these analog copy control technologies: (1) that its intellectual property is generally available on reasonable and non-discriminatory terms, as that phrase is used in normal industry parlance; (2) that manufacturers of the analog video cassette recorders that are required by this legislation to conform to these technologies will be provided royalty-free licenses for the use of its relevant intellectual property in any device that plays back packaged, prerecorded content, or that reads and responds to or generates or carries forward the elements of these technologies associated with such content; (3) in the same circumstances as described in (2), other manufacturers of devices that generate, carry forward, or read and respond to these technologies will be provided licenses carrying only modest fees (in the range of \$25,000—in current dollars—initial payment and lesser amounts as recurring annual fees); (4) that manufacturers of other products, including set-top-boxes and devices that perform similar functions (including integrated devices containing such functionality), will receive licenses on reasonable and non-discriminatory terms, including royalty terms and other considerations; and (5) that playability issues will not be the subject of license requirements but rather will be handled through an inter-industry forum that is being established for this purpose. The conferees emphasize the need for the technology's proprietor to adhere to these assurances in all future licensing.

With regard to the specific elements of this provision:

First, these technologies operate within the general NTSC television signal environment, and the conferees understand that this means that they work in relation to television signals that are of the 525/60 interlaced type, i.e., the standard definition television signal that has been used in the United States. The S-video and Hi-8 versions of covered devices are, of course, included within the coverage. Further, the new format analog video cassette recorders that are covered by paragraph (1)(A)(v) are those that receive the 525/60 interlaced type of input.

Second, it is the conferees understanding that not all analog video signals will utilize this technology, and, obviously, a device that receives a signal that does not contain these technologies need not read and respond to what might have been there if the signal had utilized the technology.

Third, a violation of paragraph (1) is a form of circumvention under Section 1201(b)(1). Accordingly, the enforcement of this provision is through the penalty provisions applicable to Section 1201 generally. A violation of paragraph (2) is also a violation of Section 1201 and hence subject to those penalty provisions. The inclusion

of paragraph (5) with regard to enforcement of paragraph (2) is intended merely to allow the particular statutory damage provisions of Section 1203 to apply to violations of this subsection.

Fourth, the conferees understand that minor modifications may be necessary in the specifications for these technologies and intend that any such modifications (and related new "revised specifications") should not negate in any way the requirements imposed by this subsection. The modifications should, however, be sufficiently minor that manufacturers of analog video cassette recorders should be free to continue to design products to conform to these technologies on the basis of the specifications existing, or actually implemented by manufacturers, as of the date of enactment of this Act.

Fifth, the provisions of paragraph (2) are intended to operate to allow copyright owners to use these technologies to prevent the making of a viewable copy of a pay-per-view, near video on demand, or video on demand transmission or prerecorded tape or disc containing one or more motion pictures or other audiovisual works, at the same time as consumers are afforded their customary ability to make analog copies of programming offered through other channels or services. Copyright owners may utilize these technologies to prevent the making of a "second generation" copy where the original transmission was through a pay television service (such as HBO, Showtime, or the like). The basic and extended basic tiers of programming services, whether provided through cable or other wireline, satellite, or future over the air terrestrial systems, may not be encoded with these technologies at all. The inclusion of paragraph (2)(D) is not intended to be read to authorize the making of a copy by consumers or others in relation to pay-per-view, near video on demand or video-on-demand transmissions or prerecorded media.

Sixth, the exclusion of professional analog video cassette recorders is necessary in order to allow the motion picture, broadcasting, and other legitimate industries and individual businesses to obtain and use equipment that is essential to their normal, lawful business operations. As a further explanation of the types of equipment that are to be subject to this exception, the following factors should be used in evaluating whether a specific product is a "professional" product:

(1) whether, in the preceding year, only a small number of the devices that are of the same kind, nature, and description were sold to consumers other than professionals employing such devices in a lawful business or industrial use;

(2) whether the device has special features designed for use by professionals employing the device in a lawful business or industrial use;

(3) whether the advertising, promotional and descriptive literature or other materials used to market the device were directed at professionals employing such devices in a lawful business or industrial use;

(4) whether the distribution channels and retail outlets through which the device is distributed and sold are ones used primarily to make sales to professionals employing such devices in a lawful business or industrial use; and

(5) whether the uses to which the device is most commonly put are those associated with the work of professionals employing the device in a lawful business or industrial use.

Seventh, paragraph (1)(B) contains a number of points worthy of explanation. In general, the requirement in paragraph (1)(B) is that manufacturers not materially reduce the responsiveness of their existing products and is also intended to be carried forward in the introduction of new models. This is particularly important in relation to the four-line colorstripe copy control technology, where the basic requirement in the statute is that a model of a recorder not be modified to eliminate conformance with the four-line colorstripe technology and where the standard for "conformance" is simply that the lines be visible and distracting in the display of a copy of material that was protected with the technology when the copy is played back, in normal viewing mode, by the recorder that made the copy and displayed on a reference display device. Specific elements of that requirement include:

(1) "Normal viewing mode" is intended to mean the viewing of a program in its natural sequence at the regular speed for playback and is not intended to allow "AGC-stripping viewing modes" to be developed. It is intended to exclude still frame or slow motion viewing from this definition.

(2) The "reference display device" concept is used in the legislation to acknowledge that manufacturers of analog video cassette recorders may use a specific display device to test their responsiveness to the colorstripe technology and then may use the level of such responsiveness as their baseline to achieve compliance. The reference display device for manufacturers that make televisions is intended to be a television set also made by that manufacturer. Where an analog video cassette recorder manufacturer does not make display devices, that manufacturer may choose a display device made by another manufacturer to serve as a reference. In general, a reference display device should be one that is generally representative of display devices in the U.S. market at the time of the testing.

(3) The conferees intend that the word "model" should be interpreted broadly and is not to be determined exclusively by alphabetic, numeric, name, or other label. Courts should look with suspicion at "new models" that reduce or eliminate conformance with this technology, as compared with that manufacturer's "previous models." Further, a manufacturer should not replace a previous model that showed intense lines with a model that shows weak lines in the played back picture.

For any new entrant into the VHS format analog video cassette recorder manufacturing business, the legislation provides that such a manufacturer will build its initial devices so as to be in conformance with the four-line colorstripe copy control technology based on the playback on a reference display device and thereafter not modify the design so that its products no longer conform to this technology.

Finally, the proprietor of the colorstripe copy control technology has supplied the Committee with a description of how the technology should work so as to provide the desired copy protection

benefits. That description is as follows: the colorstripe copy control technology works as intended if a recorder records a signal that, when played back by the playback function of that recorder in the normal viewing mode, exhibits on a reference display device a significant distortion of color on the lines which begin with a colorstripe colorburst, or a complete or intermittent loss of color throughout at least 50% of the visible image. While the conferees realize that there may be variations among recorders in relation to this technology, the conferees expect the affected manufacturers to work with the proprietor of the technology to ensure that the basic goal of content protection through this technology is achieved. The conferees understand that content protection through this technology is to the manufacturers' benefit, as well, since it encourages content providers to release more valuable content than they might otherwise release without such protection. The conferees further intend that manufacturers should seek to respond to the colorstripe technology at the highest feasible level and should not modify their recorder designs, or substitute weaker responding recorders for stronger responding recorders in order to avoid the requirements of this subsection.

Eighth, the type of colorstripe copy control technology to which the legislation requires conformance is the four-line "half burst" type version of this technology. The content provider may shift, in an adaptive fashion, from no colorstripe encoding to the two-line version to the four-line version, in order to balance the copy control features of the technology against the possible playback distortion that the four-line technology occasionally creates. This legislation requires conformance only to the four-line version, but prohibits any effort to eliminate or reduce materially the effectiveness of the two-line version in relation to any particular analog video cassette recorder that, in fact, provides a response to the two-line version. The legislation also applies the "encoding rules" in paragraph (2) to either the two-line or four-line versions of this technology.

**SECTION 104 . EVALUATION OF IMPACT OF COPYRIGHT LAW AND AMENDMENTS ON ELECTRONIC COMMERCE AND TECHNOLOGICAL DEVELOPMENT**

The Senate recedes to House section 105 with modification.

**SECTION 105 . EFFECTIVE DATE**

The Senate recedes to House section 106. This section sets forth the effective date of the amendments made by this title. The corresponding sections of the House bill and the Senate amendment are substantively identical.

**TITLE II—ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION**

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

# NIMMER ON COPYRIGHT®

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VOLUME CR1

CONGRESSIONAL COMMITTEE  
REPORTS ON THE  
DIGITAL MILLENNIUM  
COPYRIGHT ACT AND  
CONCURRENT AMENDMENTS

by

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Report 7

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**SECTION-BY-SECTION ANALYSIS OF  
H.R. 2281 AS PASSED BY THE UNITED  
STATES HOUSE OF REPRESENTATIVES  
ON AUGUST 4, 1998**

105TH CONGRESS  
*2d Session*

COMMITTEE  
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SECTION-BY-SECTION ANALYSIS OF H.R.  
2281 AS PASSED BY THE UNITED STATES  
HOUSE OF REPRESENTATIVES ON AUGUST  
4, 1998

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COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVE

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*

SEPTEMBER 1998

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[II]

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NIMMER ON COPYRIGHT

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that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”

Both of the new WIPO treaties also include substantively identical provisions on rights management information. These provisions require contracting parties to protect the integrity of rights management information. The treaties define rights management information as “information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”

Legislation is required to comply with both of these provisions. To accomplish this, this section adds a new chapter (chapter twelve) to Title 17 of the United States Code. This new chapter twelve includes four new sections to the Copyright Act—(1) section 1201, which prohibits the circumvention of technological copyright protection measures; (2) section 1202, which protects the integrity of copyright management information; (3) section 1203, which provides for civil remedies for violations of sections 1201 and 1202; and (4) section 1204, which provides for criminal penalties for violations of sections 1201 and 1202.

Subsection (a) of Section 103 thus amends title 17 to establish this new Chapter 12 to the Copyright Act to protect against certain acts of circumvention of technological measures employed by copyright owners to defend against unauthorized access to or copying of their works.

*Section 1201: Circumvention of Copyright Protection Systems.*

*Subsection (a) of new Section 1201* applies when a person who is not authorized to have access to a work seeks to gain access by circumventing a technological measure put in place by the copyright owner that effectively controls access to the work. The relevant terminology is defined in paragraph (3), as described below.

*Paragraph (1).* The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book. Subparagraph (A) establishes a general prohibition against gaining unauthorized access to a work by circumventing a technological measure put in place by the copyright owner where such measure effectively controls access to a work protected under Title 17 of the U.S. Code. This prohibition will not take effect until 2 years from the date of enactment of this chapter of the Copyright Act.

Subparagraph (B) provides that the prohibition against circumvention contained in subparagraph (A) will not apply to persons who have been authorized

to gain initial access to a work, or to nonprofit libraries, archives, educational institutions, or other nonprofit entities, with regard to a work contained within a class of works as to which such person or entity is determined to have been adversely affected by the prohibition in their ability to make

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noninfringing uses. This determination is to be made by means of a rulemaking proceeding described in subparagraph (C).

Subparagraph (C) establishes a rulemaking to be conducted in the two-year period after the enactment of this new chapter (before the prohibition contained in subparagraph (A) goes into effect), and subsequent to that, every three years, by the Secretary of Commerce, in conjunction with the Under Secretary of Commerce for Intellectual Property Policy, the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information. The rulemaking will determine, based on specific evidence, whether and to what extent the exemptions in subparagraph (B) to the prohibition contained in subparagraph (A) will take effect.

The main purpose of delaying for two years (under subparagraph (A)) the effective date of the prohibition against circumvention of access control technologies is to allow the development of a record as to how the implementation of these technologies is affecting availability of works in the market place for non-infringing uses. It is anticipated that the main focus of the rulemaking proceeding will be on whether a substantial diminution of that availability is *actually occurring* in the market for particular classes of copyrighted works. However, it should be recognized that market developments may well proceed on a different pace than the triennial schedule for rulemaking proceedings established in this subsection. Accordingly, the rule-making may also, to the extent required, assess whether an adverse impact is *likely to occur* over the time period relevant to each rule-making proceeding. However, the determination should be based upon anticipated, rather than actual, adverse impacts only in extraordinary circumstances in which the evidence of likelihood of future adverse impact during that time period is highly specific, strong and persuasive. Otherwise, the prohibition would be unduly undermined.

The focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses. Adverse impacts that flow from other sources—including marketplace trends, other technological developments, or changes in the roles of libraries, distributors or other intermediaries—or that are not clearly attributable to such a prohibition, are outside the scope of the rulemaking. So are mere inconveniences, or individual cases, that do not rise to the level of a substantial adverse impact.

In assessing the impact of the implementation of technological measures, and of the law against their circumvention, the rulemaking proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials. The technological measures—such as encryption, scrambling and electronic envelopes—that this bill protects can be deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals. These technological measures may make more works more widely available, and the process of obtaining permissions easier.

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For example, an access control technology under section 1201(a) would not necessarily prevent access to a work altogether, but could be designed to allow access during a limited time period, such as during a period of library borrowing. Technological measures are also essential to a distribution strategy that allows a consumer to purchase a copy of a single article from an electronic database, rather than having to pay more for a subscription to a journal containing many articles the consumer does not want.

Use-facilitating technological protection measures such as these would simultaneously protect the legitimate interests of copyright owners while enabling the kinds of uses by individuals that have been so important in the past in promoting the access of all Americans to the bounty of creative works available from our writers, artists, musicians, composers, film makers, and software developers. The Secretary should give appropriate weight to the deployment of such technologies in evaluating whether, on balance, the prohibition against circumvention of technological measures has caused an adverse impact on the specified categories of users of any particular class of copyrighted materials.

Similarly, in assessing the impact of the prohibition on the ability to make noninfringing uses, the Secretary should take into consideration the availability of works in the particular class in other formats that are not subject to technological protections.

Deciding the scope or boundaries of a "particular class" of copyrighted works as to which the prohibition contained in section 1201(a)(1) has been shown to have had an adverse impact is an important issue to be determined during the rulemaking proceedings. The illustrative list of categories appearing in section 102 of Title 17 is only a starting point for this decision. For example, the category of "literary works" (17 USC 102(a)(1)) embraces both prose creations such as journals, periodicals or books, and computer programs of all kinds. It is exceedingly unlikely that the impact of the prohibition on circumvention of access control technologies will be the same for scientific journals as it is for computer

operating systems; thus, these two categories of works, while both "literary works," do not constitute a single "particular class" for purposes of this legislation. Even within the category of computer programs, the availability for fair use purposes of PC-based business productivity applications is unlikely to be affected by laws against circumvention of technological protection measures in the same way as the availability for those purposes of videogames distributed in formats playable only on dedicated platforms, so it is probably appropriate to recognize different "classes" here as well.

At the same time, the Secretary should not draw the boundaries of "particular classes" too narrowly. For instance, the section 102 category "motion pictures and other audiovisual works" may appropriately be subdivided, for purposes of the rulemaking, into classes such as "motion pictures," "television programs," and other rubrics of similar breadth. However, it would be inappropriate, for example, to subdivide overly narrowly into particular genres of motion pictures, such as Westerns, comedies, or live action dramas. Singling out specific types of works by creating in the rulemaking process "particular classes" that are too narrow would be inconsistent with the intent of this bill.

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Of course, the Secretary is not required to make a determination under the statute with respect to any class of copyrighted works. In any particular 3-year period, it may be determined that the conditions for the exemption do not exist. Such an outcome would reflect that the digital information marketplace is developing in the manner which is most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention.

A determination that the exceptions in Section 1201(a)(1) are in effect for a particular class of works means that enforcement against someone who circumvents a technological measure that effectively controls access to a work falling in that class may not be undertaken during the period (not to exceed three years) covered by the determination. The determination does not change the illegality of (or the ability to enforce against) any other act of circumvention of an access control technology. For instance, if the same scrambling technology is used to protect two different classes of copyrighted works, and the Secretary makes a determination that the exceptions apply as to the first class, someone who circumvents that technology to gain unauthorized access to a work in the second class would violate the prohibition and would be subject to enforcement action.

Subparagraph (D) provides for publication by the Secretary of a list of any class of works the Secretary has determined, pursuant to subparagraph (C), to be or likely to be adversely affected. Pursuant to subparagraph (B), the prohibition

contained in subparagraph (A) shall not apply to the entities described in subparagraph (B) with respect to the particular class(es) of works published, for the following three-year period. During the next rulemaking proceeding, if it is determined that there is no longer an adverse impact on noninfringing use, the prohibition will apply and the exemption will cease to exist.

Subparagraph (E) provides that the exception contained in subparagraph (B) from the application of the prohibition contained in subparagraph (A) may not be used as a defense in any suit brought to enforce any provision of this title other than those contained in paragraph (1). For example, it would not provide a defense to a claim based on the manufacture or sale of devices under paragraph (2) or section 1201(b), or to a copyright infringement claim.

*Paragraph (2).* In order to provide meaningful protection and enforcement of the copyright owner's right to control access to his or her copyrighted work, this paragraph supplements the prohibition against the act of circumvention in paragraph (1) with prohibitions on creating and making available certain technologies, products and services used, developed or advertised to defeat technological protections against unauthorized access to a work. Similar laws have been enacted in related contexts. *See, e.g.,* 17 U.S.C. § 1002(a) (prohibiting the import, manufacture, or distribution of digital audio recording equipment lacking specified characteristics and prohibiting the import, manufacture, or distribution of any device, or the offer to perform any service, the primary purpose or effect of which is to circumvent the serial copy management system re-

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quired for digital audio equipment); 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.)

Specifically, paragraph (2) prohibits 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 work protected under Title 17. It is drafted carefully to target "black boxes," and to ensure that legitimate multipurpose devices can continue to be made and sold. 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, for use in circumventing a technological protection measure that effectively controls access to a work protected under Title 17.

This provision is designed to protect copyright owners, and simultaneously allow the development of technology.

This three-part test, established for determining when the manufacture, distribution or other provision of a product or service constitutes a violation, is the core of the anti-circumvention provisions of this legislation. This test (also spelled out in 1201(b)(1)), as explicated by the Judiciary Committee report, stands on its own. While this legislation is aimed primarily at "black boxes" that have virtually no legitimate uses, trafficking in any product or service that meets one or more of the three points in this test could lead to liability. It is not required to prove that the device in question was "expressly intended to facilitate circumvention." At the same time, the manufacturers of legitimate consumer products such as personal computers, VCR's, and the like have nothing to fear from this legislation because those legitimate devices do not meet the three-part test. The *Sony* test of "capab[ility] of substantial non-infringing uses," while still operative in cases claiming contributory infringement of copyright, is not part of this legislation, however. *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984). The relevant test, spelled out in the plain and unchanged language of the bill, is whether or not a product or service "has only limited commercially significant purpose or use other than to circumvent."

*Paragraph (3)* defines certain terms used throughout subsection (a):

(1) "circumvent a technological measure"—for purposes of subsection (a) only, which covers technological protections against unauthorized access to a work, this term means "to descramble a scrambled work, to decrypt an encrypted work, or

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otherwise to avoid, bypass, remove, deactivate, or impair a technological protection measure, without the authority of the copyright owner."

(2) "effectively controls access to a work"—a technological 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.

The report issued by the Committee on Commerce, to which certain provisions of this legislation were referred sequentially, and the statements of some individual members, could be read to provide a more narrow definition of the

"effective technological measures" this legislation is intended to protect against circumvention. These statements may reflect a misapprehension of the approach that this legislation has consistently taken ever since it was introduced.

Throughout the legislative process, the phrase "technological measure" (or, in earlier versions of the legislation, "technological protection measure")<sup>1</sup> has been treated in H.R. 2281 in terms of the function such a measure would perform, rather than the specific technology to be used or the means for developing it. The Committee on the Judiciary took this approach in crafting this legislation in recognition that technology evolves so rapidly that it would be impractical to freeze in time the applicability of these provisions by limiting them to specifically named technologies.

The bill does define the *functions* of the technological measures that are covered—that is, what it means for a technological measure to "effectively control access to a work" (section 1201 (a)(3)(B)) and to "effectively protect a right of a copyright owner under this title" [i.e., Title 17, United States Code] (section 1201(b)(2)(B)). The practical, common-sense approach taken by H.R. 2281 is that if, in the ordinary course of its operation, a technology actually works in the defined ways to control access to a work, or to control copying, distribution, public performance, or the exercise of other exclusive rights in a work, then the "effectiveness" test is met, and the prohibitions of the statute are applicable. This test, which focuses on the function performed by the technology, provides a sufficient basis for clear interpretation. It applies equally to technologies used to protect access to works whether in analog or digital formats.

This approach also follows that taken by the parallel provisions of the Communications Act. Section 553(a) of Title 47, for example, prohibits both the act of cable signal theft, and the manufacturing or distribution of "equipment intended. . . for unauthorized reception of any communications service offered over a cable system." In enacting this provision, Congress did not seek to define the particular technologies used by cable systems to prevent theft of service, nor the particular means of circumvention that were prohibited. Rather, the prohibition extends to any unauthorized act of "intercepting" cable signals, as well as to any equipment whose intended function is to circumvent any protective mechanism.

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The Committee on the Judiciary, which possesses primary jurisdiction over this legislation, considered the argument that the lack of a definition of "technological measure" leaves manufacturers in the dark as to the range of protective technologies to which their products must respond. The Committee

<sup>1</sup> Either phrase must be distinguished from "standard technical measure," as that phrase is used in Title II of the bill.



concluded that any such concern is unfounded. No legitimate manufacturer of consumer electronics devices or computer equipment could reasonably claim to be left in doubt about the course of action to be avoided, simply because the phrase “technological measure” is not itself defined in the bill. The only obligation imposed on manufacturers by this legislation is a purely negative one: to refrain from affirmatively designing a product or a component *primarily* for the purpose of circumventing a protective technology that effectively controls unauthorized access to or uses of a copyrighted work.

Any effort to read into this bill what is not there—a statutory definition of “technological measure”—or to define in terms of particular technologies what constitutes an “effective” measure, could inadvertently deprive legal protection to some of the copy or access control technologies that are or will be in widespread use for the protection of both digital and analog formats. Perhaps more importantly, this approach runs a substantial risk of discouraging innovation in the development of protective technologies. For instance, today the standard form of encryption of digital materials involves scrambling its contents so that they are unintelligible unless processed with a key supplied by the copyright owner or its agent. However, in a field that changes and advances as rapidly as encryption research, it would be short-sighted to write this definition into a statute as the exclusive technological means protected by this bill.

If only those measures that are in use or on the “drawing board” today are effectively protected against circumvention, the innovative new methods that are certain to be developed as a result of this legislation may fall outside the scope of any definition Congress can write today. It would then not be a violation to circumvent these new methods of protection, or even to go into the business of making devices or providing services for the purpose of circumventing them, even though the new methods are effective, in the ordinary course of their operation, in controlling access to or the exercise of exclusive rights with respect to a work, and even if they accomplish these goals more efficiently and effectively than the measures that are in place or under development today. As a result, property owners would not be protected and there would be no market for such measures to protect copyright. The flexible and pragmatic approach of this legislation avoids this scenario by making it clear that if a technology works to control access or the exercise of exclusive rights—in other words, if it meets the definitions of effectiveness contained in subsections 1201(a)(3)(B) or 1201(b)(2)(B)—no matter how it does so, the prohibitions of the statute are applicable.

Similarly, the statements in the Commerce Committee report that attempt to read out of the ambit of “effective” technological measures those technologies that affect the appearance of the display or performance of the works protected find no support in either the text of the bill or in the authoritative legislative history

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of these provisions prepared by the Judiciary Committee. The definitions contained in sections 1201(a)(3)(B) and 1201(b)(2)(B) require no further embellishment. The statements contained in the Commerce Committee report are problematic because they could be read to suggest that electronic equipment manufacturers should feel free to circumvent technological protections if they believe their equipment would function better without them in displaying or performing works.

For example, some forms of digital "watermarking" superimpose a faint image on a copyrighted work to protect it from unauthorized copying. If there were a "playability" exception to the anti-circumvention provisions of this bill, as these statements incorrectly imply, then devices or services specifically designed for the purpose of removing such "watermarks" could be immunized under the pretext that they improve image resolution. Such a result would undermine the purpose of this legislation.

While the best approach is for copyright owners and equipment manufacturers to cooperate in the development of measures that can maximize protection while minimizing impact, it is not the intent of this legislation that manufacturers should have the authority to determine unilaterally which protective technologies copyright owners may employ. More importantly, there is nothing in the bill, nor in the authoritative legislative history, which supports the assertion that circumvention of an otherwise effective technological measure is acceptable if done in the name of "playability." Since the text of the legislation relating to this has not been amended to establish this principle, any effort to read such a principle into the words the sponsors wrote, and that both the Judiciary Committee and the Commerce Committee approved, should be dismissed.

*Subsection (b)* applies when a person has obtained authorized access to a copy or a phonorecord of a work, but the copyright owner has put in place technological measures that effectively protect his or her rights under Title 17 to control or limit the nature of the use of the copyrighted work.

*Paragraph (1)*: Paralleling subsection (a)(2), above, paragraph (1) seeks to provide meaningful protection and enforcement of copyright owners' use of technological measures to protect their rights under Title 17 by prohibiting the act of making or selling the technological means to overcome these protections and facilitate copyright infringement. Paragraph (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 measure that effectively protects a right of a copyright owner under Title 17 in a work or portion thereof. 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.

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or by another person acting in concert with that person, for use in circumventing a technological protection measure that effectively protects the right of a copyright owner under Title 17 in a work or a portion thereof.

Like subsection (a)(2), this provision is designed to protect copyright owners, and simultaneously allow the development of technology.

*Paragraph (2)* defines certain terms used in subsection (b):

(1) "circumvent protection afforded by a technological measure" is defined as "avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure."

(2) "effectively protects a right of a copyright owner under Title 17"—a technological measure effectively protects a right of a copyright owner under Title 17 "if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right under Title 17 of a copyright owner."

The legislative history described under subsection (a)(3), above, pertains to subsection (b) as well. As stated earlier, the practical, common-sense approach taken by H.R. 2281 is that if, in the ordinary course of its operation, a technology works to control copying, distribution, public performance, or the exercise of other exclusive rights in a work, then the "effectiveness" test is met, and the prohibitions of the statute are applicable. This test, which focuses on the function performed by the technology, provides a sufficient basis for clear interpretation. It applies equally to technologies used to protect works whether in analog or digital formats. Further, there is nothing in the bill, nor in the authoritative legislative history, which supports the assertion that circumvention of an otherwise effective technological measure is acceptable if done in the name of "playability."

*Subsection (c)* provides that section 1201 shall not have any effect on rights, remedies, limitations, or defenses to copyright infringement, including fair use, under Title 17. *Paragraph (2)* provides that section 1201 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. Together, these provisions are intended to ensure that none of the provisions in section 1201 affect the existing legal regime established in the Copyright Act and case law interpreting that statute.

Paragraph (3) clarifies that nothing in section 1201 creates a mandate requiring manufacturers of consumer electronics, telecommunications, and computing products to design their products or their parts and components to respond to any particular technological measure employed to protect a copyrighted work. While the failure of a product to respond to a particular technological measure does not in and of itself create liability, neither does it immunize those trafficking in the product from liability under section 1201(a)(2) or (b), if the tests of liability in those provisions are otherwise met.

*Subsection (d)* 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

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to whether it wishes to acquire a copy, or portion of a copy, of that work in order to engage in conduct permitted under the Copyright Act, such as a fair use under section 107. 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.

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 exposing itself to penalties for violation of section 1201.

This paragraph can not be used as a defense to the prohibitions on manufacturing or selling devices contained in subsection (a)(2) or subsection (b).

*Subsection (e)* makes clear that the prohibitions in section 1201 do not prohibit any lawfully authorized investigative, protective, or intelligence activity by or at the direction of a federal, state, or local law enforcement agency, or of an intelligence agency of the United States.

*Subsection (f)* is intended to allow legitimate software developers to continue engaging in certain activities for the purpose of achieving interoperability to the extent permitted by law prior to the enactment of this chapter. The objective is to ensure that the effect of current case law interpreting the Copyright Act is not changed by enactment of this legislation for certain acts of identification and analysis done in respect of computer programs. *See, Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 24 U.S.P.Q.2d 1561 (9th Cir. 1992). The purpose

of this subsection is to avoid hindering competition and innovation in the computer and software industry.

Paragraph (1) permits the circumvention of access control technologies for the sole purpose of achieving software interoperability. For example, this subsection permits a software developer to circumvent an access control technology applied to a portion or portions of a program in order to perform the necessary steps to identify and analyze the information needed to achieve interoperability. Subsection (f)(1) permits the act of circumvention in only certain instances. First, the copy of the computer program which is the subject of the analysis must be lawfully acquired. That is, 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. The permitted acts are limited in application to those elements of the program which must be analyzed to achieve the sole permitted purpose, which is interoperability of an independently created program with other programs. Interoperability is defined in paragraph (4) as the ability of computer programs to exchange information, and for such programs mutually to use the information which has been exchanged. The resulting product must be a new and original work, not infringing the original computer program. In addition, the objective of the analysis must be to identify and extract such elements as are necessary to achieve interoperability and which are not otherwise

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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 fall within the scope of fair use or otherwise avoid infringing the copyright of the author of the underlying computer program.

Paragraph (2) recognizes that to accomplish the acts permitted under paragraph (1) a person may, in some instances, have to make and use certain tools. In most instances these will be generally available tools that programmers use in developing computer programs, such as compilers, trace analyzers and disassemblers, which do not fall within the prohibition of this section. In certain instances, it is possible that a person may have to develop special tools to achieve the permitted purpose of interoperability. Thus, this provision creates an exception to the prohibition on making circumvention tools contained in sections 1201(a) (2) and (b). These tools can be either software or hardware. Again, this provision is limited by a general ban on acting in a way that constitutes infringing activity.

Paragraph (3) recognizes that developing complex computer programs often involves the efforts of many persons. For example, someone may be hired to develop a specific portion of the final product. For that person to perform this task, some of the information acquired through the permitted analysis, and the

tools to accomplish it, may have to be made available to that person. This subsection 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. Recognizing, however, that making circumvention information or tools generally available would undermine the objectives of this Act, the provision imposes strict limitations. 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 another purpose, he is not covered by this exemption. In addition, the acts are permitted only to the extent that they do not constitute infringement under this title, or violate applicable law other than this title.

Paragraph (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 creating an interoperable independently created program. This provision 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. Accordingly, since the goal of interoperability is the touchstone of the exceptions contained in paragraphs (1)-(3), nothing in those paragraphs 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.

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*Subsection (g)* is intended to facilitate the purpose of this bill, namely, to improve the ability of copyright owners to prevent the theft of their works, including by applying technological measures. The effectiveness of such measures depends in large part on the rapid and dynamic development of better technologies, including encryption-based technological measures. The development of encryption science requires ongoing research and testing by scientists of existing encryption methods in order to build on those advances, thus promoting encryption technology generally.

The goals of section 1201 would be poorly served if these provisions had the undesirable consequence of chilling legitimate research activities in the area of encryption. Subsection (g) ensures that the prohibitions contained in this bill do not have such an unintended negative effect. This subsection provides that generally available encryption testing tools meeting certain specifications will

not be made illegal by this Act. If each of these tools has a legitimate and substantial commercial purpose—testing security and effectiveness—it is therefore explicitly excluded from the prohibition in section 1201.

In addition to the exemption contained in this subsection, the testing of specific encryption algorithms would not fall within the scope of 1201, since mathematical formulas as such are not protected by copyright. Thus, testing of an encryption algorithm or program that has multiple uses, including use as a technological measure to protect copyrighted works, would not be prohibited when the encryption is in a form not implemented as a technological measure. Similarly, the testing of encryption technologies developed by the government of the United States would not violate section 1201, since copyright does not subsist in such subject matter. Also, encryption research will often be undertaken with the consent or at the direction of the copyright owner and therefore will not give rise to any action under section 1201.

For example, a cryptographer may use various cryptanalytic research techniques to discover a flaw in the U.S. government's Escrowed Encryption Standard (EES) used in the Clipper Chip and Fortezza cards. The flaw allows users to circumvent essential features of the algorithm. Since these encryption products are not covered by copyright, because they are merely mathematical algorithms in addition to being owned by the U.S. government, the cryptographer's acts do not violate 1201.

Another example would be a company, in the course of developing a new cryptographic product, sponsoring a crypto-cracking contest with cash prizes. Contestants would not violate section 1201, since the research acts are specifically authorized.

Significantly, section 1201 does not make illegal cryptographic devices that have substantial legitimate purposes other than to circumvent technological protection measures as applied to a work. For example, many popular word processing and other computer programs include a security feature allowing users to password-protect documents (employing a low-grade form of encryption.) It is not uncommon for users of such products to forget or lose their passwords for such documents, making their own protected works unrecoverable. As a result, many independent programmers have created utilities designed to assist in the recovery of passwords or

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password-protected works. Several of these utilities are distributed over the Internet as freeware or shareware. Because these utilities have a substantial legitimate use, and because they would be used by persons to gain access to their own works, these devices do not violate section 1201.

H.R. 2281 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. So long as these devices have a substantial legitimate use, and do not become used principally to facilitate infringement, they would not be prohibited by section 1201.

Today, network and web site management and security tools increasingly contain components that automatically test a system's 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. Again, because these devices are good products put to a good use, they do not fall within the scope of this statute.

In sum, the prohibition on "devices" as written does not encompass many forms of useful encryption products. Subsection (g) is specifically structured to go further, and allow the development and use of certain additional encryption products used for research purposes.

Under the exemption, it would not be prohibited conduct for a person to circumvent a technical measure effectively controlling access to a copyrighted work in the course of engaging in *good faith* encryption research if the following conditions apply: that person has lawfully obtained the encrypted copy of the copyrighted work; circumvention is necessary to conduct good faith encryption research; the person first made a good faith effort to obtain authorization from the copyright owner before circumventing; and the act of circumvention does not constitute copyright infringement or a violation of other applicable law, such as 18 USC 1030 or the provisions of the Computer Fraud and Abuse Act of 1986.

Paragraph (3) lists the factors to be used in determining whether a person qualifies for the exemption contained in this subsection. Specifically, in any suit for violation of section 1201 where this subsection is used as an affirmative defense, a court should consider whether the information derived from the encryption research was disseminated by the defendant to others, and if so, whether it was done in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, instead of to facilitate infringement or to otherwise violate the law, such as laws protecting privacy rights or security. A court should also consider whether the defendant is engaged in a legitimate course of study, is employed, or is appropriately trained and experienced, in the field of encryption technology, and whether the defendant provides the copyright owner of the work in question with notice of the findings and documentation of the research conducted in good faith.

Paragraph (4) allows a person to develop the means to conduct the encryption research allowed in this subsection notwithstanding the prohibition on devices



contained in subsection (a)(2). Specifically, a person may develop and employ technological means to cir-

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cumvent a technological measure as described in paragraph (2), and provide the technological means to another person with whom he or she is working collaboratively, only for the purpose of conducting research in accordance with paragraph (2), or for the limited purpose of having that other person verify the research conducted in accordance with paragraph (2).

Paragraph (5) requires the Under Secretary of Commerce for Intellectual Property Policy, the Register of Copyrights and the Assistant Secretary of Commerce for Communications and Information to jointly report to Congress and to suggest any changes in legislation no later than one year after the effective date of section 1201, regarding the effect this subsection has had on encryption research and the development of encryption technology, the adequacy and effectiveness of technological measures designed to protect copyrighted works pursuant to the protections offered under section 1201, and the protection of copyright owners against unauthorized access to their copyrighted works.

*Subsection (h).* This provision contains two exceptions regarding minors. To alleviate concern that section 1201(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, and to alleviate concern that section 1201(a) might inadvertently make it unlawful for parents to view a copy of a test, examination or other evaluation of their child, subsection (h) allows circumvention under very specific and limited circumstances.

Paragraph (1) allows a court, in applying the prohibition contained in subsection (a) to a component or part of a technology, product, service or device which is subject to a case or controversy before it, to consider the necessity for the intended and actual incorporation of the component or part in the technology, product, service or device, if the technology, product, service or device does not itself violate the provisions of this title and has as its sole purpose the prevention of access of minors to material on the Internet. This paragraph is intended to allow the continued manufacturing and development of specific technology to aid parents in preventing access by their children to objectionable material in the digital environment.

Paragraph (2) allows a parent of a minor child (an elementary or secondary school student) to circumvent a technological measure effectively controlling access to a copyrighted test, examination, or other evaluation of that minor child, if the parent has first made a good faith effort to obtain authorization from the

copyright owner to view the test, examination, or other evaluation and if, as a result of the copyright owner's refusal, circumvention is necessary for purposes of obtaining a copy of such test, examination or other evaluation.

*Subsection (i)* deals with personal privacy concerns. It allows the circumvention of a technological measure effectively controlling access to a copyrighted work for the limited purpose of identifying and disabling any capability of the measure or work to collect or disseminate personally identifying information reflecting the online activities of the user, only if the user is not provided with notice

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and the capability to prevent or restrict such collection or dissemination, and only if the circumvention conducted to identify and disable the ability of the measure to collect or disseminate has no other effect on the ability of any person to gain access to any work.

It is possible that certain encryption or other technologies used to protect copyrighted works under section 1201 may collect or disseminate personally identifying information about the online activities of a user. To maintain privacy in the digital environment, subsection (i) was established to allow the circumvention of such technologies in order to identify and disable any ability to collect or disseminate personally identifying information, where such an ability to identify and disable is not already provided to the user. It is hoped that this subsection will serve as a deterrent to the development and use of technologies that are capable of such collection and information and do not either provide a method by which a user may disable those capabilities, or fully disclose the lack of such methods.

*Section 1202: Integrity of Copyright Management Information.*

*Subsection (a)* establishes a general prohibition against knowingly providing, distributing or importing false copyright management information ("CMI"), as defined in subsection (c). There are two prerequisites that must be met for the conduct to be illegal: (1) the person providing, distributing or importing the false CMI must know the CMI is false, and (2) he or she must do so with the intent to induce, enable, facilitate or conceal an infringement of any right under Title 17. The prohibition in this subsection does not apply to the ordinary and customary practices of broadcasters or the inadvertent omission of credits from broadcasts of audiovisual works, since such acts do not involve the provision of false CMI with the requisite knowledge and intent.

*Subsection (b)* establishes a general prohibition against deliberately removing or altering CMI, and against distributing or importing for distribution altered CMI or distributing, importing for distribution or publicly performing works in which

WIPO COPYRIGHT TREATIES IMPLEMENTATION AND ON-  
LINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

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

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Mr. COBLE, from the Committee on the Judiciary,  
submitted the following

R E P O R T

[To accompany H.R. 2281]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, 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, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

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.”.

#### PURPOSE AND SUMMARY

H.R. 2281 contains two titles. The first, entitled the “WIPO Copyright Treaties Implementation Act,” implements World Intellectual Property Organization sponsored copyright agreements signed by the United States. The second, entitled the “On-Line Copyright Infringement Liability Limitation Act,” limits the liability on-line and Internet service providers may incur as a result of transmissions containing copyrighted works traveling through systems and networks under their control.

#### BACKGROUND AND NEED FOR THE LEGISLATION

##### *The “WIPO Copyright Treaties Implementation Act”*

The digital environment now allows users of electronic media to send and retrieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world. With this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works.

In Geneva, Switzerland, in December, 1996, a Diplomatic Conference was convened under the auspices of the World Intellectual Property Organization (“WIPO”), to negotiate new multilateral treaties to protect copyrighted material in the digital environment and to provide stronger international protection to performers and producers of phonograms. In addition to the digital issues, the latter is important to provide guarantees abroad of the same strong protection for American records, tapes, and compact discs abroad that is provided domestically.

The conference produced two treaties, the “WIPO Copyright Treaty” and the “WIPO Performances and Phonograms Treaty,” which were adopted by consensus by over 150 countries. The treaties will ensure adequate protection for American works in countries around the world at a time when borderless digital means of dissemination are becoming increasingly popular. While such rapid dissemination of perfect copies will benefit both U.S. owners and consumers, it will unfortunately also facilitate pirates who aim to destroy the value of American intellectual property.

The successful negotiation of the treaties brings with it the need for domestic implementing legislation. Title I of this bill contains two substantive additions to U.S. domestic law, in addition to some technical changes, to bring the law into compliance with the treaties so that they may be ratified appropriately.

The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law. They do, however, require two technological adjuncts to the copyright law, intended to ensure a thriving electronic marketplace for copyrighted works on the

Internet. The treaties address the problems posed by the possible circumvention of technologies, such as encryption, which will be used to protect copyrighted works in the digital environment and to secure on-line licensing systems. To comply with the treaties, the U.S. must make it unlawful to defeat technological protections used by copyright owners to protect their works. This would include preventing unauthorized access as well as the manufacture and sale of devices primarily designed to decode encrypted copyrighted material. Further, the U.S. must, under the treaties, make it unlawful to intentionally provide false information, or to deliberately alter or delete information provided by a copyright owner which identifies a work, its owner or performer, and the terms and conditions for its use.

When copyrighted material is adequately protected in the digital environment, a plethora of works will be distributed and performed over the Internet. In order to protect the owner, copyrighted works will most likely be encrypted and made available to consumers once payment is made for access to a copy of the work. There will be those who will try to profit from the works of others by decoding the encrypted codes protecting copyrighted works, or engaging in the business of providing devices or services to enable others to do so. A new "Section 1201" to the Copyright Act is required by both WIPO Treaties to make it unlawful to engage in such activity. The changes contained in the new Section 1201 are meant to parallel similar types of protection afforded by Federal telecommunications law and state laws. Just as Congress acted in the areas of cable television and satellite transmissions to prevent unauthorized interception and descrambling of signals, it is now necessary to address the on-line environment.

While there are no objections to preventing piracy on the Internet, it is not easy to draw the line between legitimate and non-legitimate uses of decoding devices, and to account for devices which serve legitimate purposes. The bill, as reported, presents a reasonable compromise by preventing only the manufacture or sale of devices that: (1) are "primarily designed" to grant free, unauthorized access to copyrighted works; (2) have only limited commercially significant purpose or use other than to grant such free access; or (3) are intentionally marketed for use in granting such free access. This would not include normal household devices such as Videocassette Recorders or personal computers, since such devices are not "primarily designed" to circumvent technological protections granting access to copyrighted works, have obvious and numerous commercially significant purposes and uses other than circumventing such protections, and are not intentionally marketed to circumvent such protections. It would however, prevent a manufacturer from making a device that is primarily designed for such a purpose and labeling it as a common household device.

A new "Section 1202" to the Copyright Act is required by both WIPO Treaties to ensure the integrity of the electronic marketplace by preventing fraud and misinformation. The section prohibits intentionally providing false copyright management information, such as the title of a work or the name of its author, with the intent to induce, enable, facilitate or conceal infringement. It also prohibits the deliberate deleting or altering copyright management

information. This section will operate to protect consumers from misinformation as well as authors and copyright owners from interference with the private licensing process.

*The "On-Line Copyright Infringement Liability Limitation Act"*

The "On-Line Copyright Infringement Liability Limitation Act" addresses concerns raised by a number of on-line service and Internet access providers regarding their potential liability when infringing material is transmitted on-line through their services. While several judicially created doctrines currently address the question of when liability is appropriate, providers have sought greater certainty through legislation as to how these doctrines will apply in the digital environment.

Title II of this bill codifies the core of current case law dealing with the liability of on-line service providers, while narrowing and clarifying the law in other respects. It offers the advantage of incorporating and building on those judicial applications of existing copyright law to the digital environment that have been widely accepted as fair and reasonable.

The bill distinguishes between direct infringement and secondary liability, treating each separately. This structure is consistent with evolving case law, and appropriate in light of the different legal bases for and policies behind the different forms of liability.

As to direct infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another. Thus, the bill essentially codifies the result in the leading and most thoughtful judicial decision to date: *Religious Technology Center v. Netcom On-line Communications Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995). In doing so, it overrules those aspects of *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993), insofar as that case suggests that such acts by service providers could constitute direct infringement, and provides certainty that *Netcom* and its progeny, so far only a few district court cases, will be the law of the land.

As to secondary liability, the bill changes existing law in two primary respects: (1) no monetary relief can be assessed for the passive, automatic acts identified in *Religious Technology Center v. Netcom On-line Communications Services, Inc.*; and (2) the current criteria for finding contributory infringement or vicarious liability are made clearer and somewhat more difficult to satisfy. Injunctive relief will, however, remain available, ensuring that it is possible for copyright owners to secure the cooperation of those with the capacity to prevent ongoing infringement. Failure to qualify for the exemption or limitation does not mean that the provider is necessarily an infringer or liable for monetary damages. If the exemption or limitation does not apply, the doctrines of existing law will come into play, and liability will only attach to the extent that the court finds that the requirements for direct infringement, contributory infringement or vicarious liability have been met, that the conduct is not excused by any other exception or limitation, and that monetary remedies are appropriate. Where monetary remedies remain available under the bill, the ordinary rules for courts to follow in setting the amounts of those remedies will still apply. This includes the remittal of statutory damages under paragraph 504

(c)(2) for non-profits and public broadcasting entities based on the reasonable belief that the infringing act was a fair use.

Safeguards in the bill include language intended to guard against interference with privacy; a provision ensuring that non-profit institutions such as universities will not be prejudiced when they determine that an allegedly infringing use is fair use; a provision protecting service providers from lawsuits when they act to assist copyright owners in limiting or preventing infringement; and a provision requiring payment of costs incurred when someone knowingly makes false accusations of on-line infringement.

#### HEARINGS

The Committee's Subcommittee on Courts and Intellectual Property held two days of hearings on this legislation on September 16 and 17, 1997 (Serial #33). Testimony was received from The Honorable Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Patent and Trademark Office, United States Department of Commerce; The Honorable Marybeth Peters, Register of Copyrights, United States Copyright Office, The Library of Congress; Roy Neel, President and Chief Executive Officer, United States Telephone Association; Jack Valenti, President and Chief Executive Officer, Motion Picture Association of America; Robert Holleyman, President, Business Software Alliance; M.R.C. Greenwood, Chancellor, University of California, Santa Cruz, on behalf of the Association of American Universities and the National Association of State Universities and Land Grant Colleges; Tushar Patel, Vice President and Managing Director, USWeb; Lawrence Kenswil, Executive Vice President, Business and Legal Affairs, Universal Music Group; Marc Jacobson, General Counsel, Prodigy Services, Inc.; Ken Wasch, President, Software Publishers Association; Ronald G. Dunn, President, Information Industry Association; John Bettis, Songwriter, on behalf of the American Society of Composers Authors and Publishers; Allee Willis, Songwriter, on behalf of Broadcast Music, Incorporated; Robert L. Oakley, Professor of Law, Georgetown University Law Center and Director, Georgetown Law Library, on behalf of a Coalition of Library and Educational Organizations; Johnny Cash, Vocal Artist, with Hilary Rosen, President and Chief Executive Officer, Recording Industry Association of America; Allan Adler, Vice President, Legal and Governmental Affairs, Association of American Publishers; Gail Markels, General Counsel and Senior Vice President, Interactive Digital Software Association; Mike Kirk, Executive Director, American Intellectual Property Law Association; Thomas Ryan, President, SciTech Software, Inc.; Mark Belinsky, Vice President, Copy Protection Group, Macrovision, Inc.; Douglas Bennett, President, Earlham College, Vice President, American Council of Learned Societies, on behalf of the Digital Future Coalition; Edward J. Black, President, Computer and Communications Industry Association; Christopher Byrne, Director of Intellectual Property, Silicon Graphics, Inc., on behalf of the Information Technology Industry Council; and Gary Shapiro, President, Consumer Electronics Manufacturer's Association (a sector of the Electronic Industries Association), and Chairman, Home Recording Rights Coalition.

*Change to Section 507(a)*

Currently, section 507(a) provides for a three-year statute of limitations period for all criminal copyright actions. Section 507(a) is amended to recognize exceptions to the three-year limitations period if expressly provided elsewhere in Title 17. New chapter 12 of Title 17 provides for a five-year criminal limitation period.

*Section 103: Copyright Protection Systems and Copyright Management Information*

*Summary*

The two new WIPO Treaties include substantively identical provisions on technological measures of protection (also commonly referred to as the "black box" or "anticircumvention" provisions). These provisions require contracting parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

Both of the new WIPO treaties also include substantively identical provisions on copyright management information. These provisions require contracting parties to protect the integrity of copyright management information. The treaties define copyright management information as "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

Legislation is required to comply with both of these provisions. To accomplish this, the bill adds a new chapter (chapter twelve) to Title 17 of the United States Code. This new chapter twelve includes four sections—(1) section 1201, which prohibits the circumvention of technological copyright protection measures; (2) section 1202, which protects the integrity of copyright management information; (3) section 1203, which provides for civil remedies for violations of sections 1201 and 1202; and (4) section 1204, which provides for criminal penalties for violations of sections 1201 and 1202.

*Section 1201: Circumvention of Copyright Protection Systems*

*Subsection (a)* applies when a person has not obtained authorized access to a copy or a phonorecord of a work for which the copyright owner has put in place a technological measure that effectively controls access to his or her work. The relevant terminology is defined in paragraph (a)(3), as described below.

*Paragraph (a)(1).* The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of breaking into a locked room in order to obtain a copy of a book. Paragraph (a)(1) establishes a general prohibition against gaining unauthorized ac-



cess to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a work protected under Title 17 of the U.S. Code.

Paragraph (a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures. In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.

*Paragraph (a)(2).* In order to provide meaningful protection and enforcement of the copyright owner's right to control access to his or her copyrighted work, this paragraph supplements the prohibition against the act of circumvention in paragraph (a)(1) with prohibitions on creating and making available certain technologies, products and services used, developed or advertised to defeat technological protections against unauthorized access to a work. Similar laws have been enacted in related contexts. *See, e.g.,* 17 U.S.C. § 1002(a) (prohibiting the import, manufacture, or distribution of digital audio recording equipment lacking specified characteristics and prohibiting the import, manufacture, or distribution of any device, or the offer to perform any service, the primary purpose or effect of which is to circumvent the serial copy management system required for digital audio equipment); 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.)

Specifically, paragraph (a)(2) prohibits 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 work protected under Title 17. It is drafted carefully to target "black boxes," and to ensure that legitimate multipurpose devices can continue to be made and sold. 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, for use in circumventing a technological protection measure that effectively controls access to a work protected under Title 17.

This provision is designed to protect copyright owners, and simultaneously allow the development of technology.

*Paragraph (a)(3)* defines certain terms used throughout paragraph (a):

(1) "circumvent a technological protection measure"—for purposes of paragraph (a) only, which covers protections against unauthorized initial access to a work, this term 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."

(2) "effectively controls access to a work"—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.

*Subsection (b)* applies when a person has obtained authorized access to a copy or a phonorecord of a work, but the copyright owner has put in place technological measures that effectively protect his or her right under Title 17 to control or limit further use of the copyrighted work.

*Paragraph(b)(1)*. Paralleling paragraph (a)(2), above, paragraph (b)(1) seeks to provide meaningful protection and enforcement of copyright owners' use of technological protection measures to protect their rights under Title 17 by prohibiting the act of making or selling the technological means to overcome these protections and facilitate copyright infringement. Paragraph (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 under Title 17 in a work or portion thereof. 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, for use in circumventing a technological protection measure that effectively protects the right of a copyright owner under Title 17 in a work or a portion thereof.

Like paragraph (a)(2), this provision is designed to protect copyright owners, and simultaneously allow the development of technology.

*Paragraph (b)(2)* defines certain terms used in subsection (b):

(1) "circumvent protection afforded by a technological protection measure" is defined as "avoiding, bypassing, removing, deactivating, or otherwise impairing a technological protection measure."

(2) "effectively protects a right of a copyright owner under Title 17"—a technological protection measure effectively pro-

protects a right of a copyright owner under Title 17 "if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right under Title 17 of a copyright owner."

*Subsection (c)* prohibits the importation, sale for importation, or sale within the United States after importation by the owner, importer or consignee of any technology, product, service, device, component, or part thereof covered by subsections (a) or (b). This paragraph further provides that violations of this provision are actionable under section 1337 of Title 19 of the U.S. Code, which authorizes actions by the International Trade Commission against unfair import practices.

*Subsection (d)* provides that section 1201 shall not have any effect on rights, remedies, limitations, or defenses to copyright infringement, including fair use, under Title 17. This provision is intended to ensure that none of the provisions in section 1201 affect the existing legal regime established in the Copyright Act and case law interpreting that statute.

*Subsection (e)* 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 conduct permitted under the Copyright Act, such as a fair use under section 107. 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.

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.

This paragraph shall not be used as a defense to the prohibitions on manufacturing or selling devices contained in paragraph (a)(2) or subsection (b).

*Subsection (f)* makes clear that the prohibitions in section 1201 do not prohibit any lawfully authorized investigative, protective, or intelligence activity by or at the direction of a federal, state, or local law enforcement agency, or of an intelligence agency of the United States.

#### *Section 1202: Integrity of Copyright Management Information*

*Subsection (a)* establishes a general prohibition against intentionally providing false copyright management information ("CMI"), as defined in subsection (c), and against distributing or importing for distribution false CMI. There are two prerequisites that must be met for these prohibitions to be violated: (1) the person providing, distributing or importing the false CMI must know the CMI is false, and (2) the person providing, distributing, or importing the false CMI must do so with the intent to induce, enable, facilitate or conceal an infringement of any right under Title 17. The prohibition in this subsection does not include ordinary and customary

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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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.<sup>1</sup>

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-

<sup>1</sup> 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(1)(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.

## 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' long-standing 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.<sup>2</sup>

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.

<sup>2</sup> 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-

#### 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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# Federal Register

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Friday,  
October 27, 2000

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Part V

**Library of Congress**

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Copyright Office

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37 CFR Part 201

**Exemption to Prohibition on  
Circumvention of Copyright Protection  
Systems for Access Control Technologies;  
Final Rule**

## LIBRARY OF CONGRESS

## Copyright Office

## 37 CFR Part 201

[Docket No. RM 99-7D]

**Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies**

**AGENCY:** Copyright Office, Library of Congress.

**ACTION:** Final Rule.

**SUMMARY:** This rule designates the classes of copyrighted works that the Librarian of Congress has determined shall be subject to exemption from the prohibition against circumvention of a technological measure that effectively controls access to a work protected under title 17 of the U.S. Code. In title I of the Digital Millennium Copyright Act, Congress established that this prohibition against circumvention will become effective October 28, 2000. The same legislation directed the Register of Copyrights to conduct a rulemaking procedure and to make recommendations to the Librarian as to whether any classes of works should be subject to exemptions from the prohibition against circumvention. The exemptions set forth in this rule will be in effect until October 28, 2003.

**EFFECTIVE DATE:** October 28, 2000.

**FOR FURTHER INFORMATION CONTACT:** Charlotte Douglass or Robert Kasunic, Office of the General Counsel, Copyright GC/I&R, P.O. Box 70400, Southwest Station, Washington, DC 20024. Telephone (202) 707-8380; telefax (202) 707-8366.

**SUPPLEMENTARY INFORMATION:**

**Recommendation of the Register of Copyrights**

**I. Background**

**A. Legislative Requirements for Rulemaking Proceeding**

The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) require that Contracting Parties provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors or other copyright owners (or, in the case of the WPPT, performers and producers of phonograms) use in connection with the exercise of their rights and that restrict acts which they

have not authorized and are not permitted by law.<sup>1</sup>

In fulfillment of these treaty obligations, on October 28, 1998, the United States enacted the Digital Millennium Copyright Act ("DMCA"), Pub. L. 105-304 (1998). Title I of the Act added a new Chapter 12 to Title 17 U.S.C., which among other things prohibits circumvention of access control technologies employed by or on behalf of copyright owners to protect their works. Specifically, new subsection 1201(a)(1)(A) provides, *inter alia*, that "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." Congress found it appropriate to modify the prohibition to assure that the public will have continued ability to engage in noninfringing uses of copyrighted works, such as fair use. See the Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, pt. 2, at 36 (1998) (hereinafter *Commerce Comm. Report*). Subparagraph (B) limits this prohibition. It provides that the prohibition against circumvention "shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title" as determined in this rulemaking. This prohibition on circumvention becomes effective on October 28, 2000, two years after the date of enactment of the DMCA.

During the 2-year period between the enactment and the effective date of the provision, the Librarian of Congress must make a determination as to classes of works exempted from the prohibition. This determination is to be made upon the recommendation of the Register of Copyrights in a rulemaking proceeding. The determination thus made will remain in effect during the succeeding three years. In making her recommendation, the Register of Copyrights is to consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on

<sup>1</sup> The treaties were adopted on December 20, 1996 at a World Intellectual Property Organization (WIPO) Diplomatic Conference on Certain Copyright and Neighboring Rights Questions. The United States ratified the treaties in September, 1999. The treaties will go into effect after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

the Assistant Secretary's views. 17 U.S.C. 1201(a)(1)(C).

A more complete explanation of the development of the legislative requirements is set out in the Notice of Inquiry published on November 24, 1999, 64 FR 66139, and is also available on the Copyright Office's website at: <http://www.loc.gov/copyright/1201/anticirc.html>. See also the discussion in section III.A. below.

**B. Responsibilities of Register of Copyrights and Librarian of Congress**

The prohibition against circumvention is subject to delayed implementation in order to permit a determination whether users of particular classes of copyrighted works are likely to be adversely affected by the prohibition in their ability to make noninfringing uses. By October 28, 2000, upon the recommendation of the Register of Copyrights in a rulemaking proceeding, the Librarian of Congress must determine whether to exempt certain classes of works (which he must identify) from the application of the prohibition against circumvention during the next three years because of such adverse effects.

The Register was directed to conduct a rulemaking proceeding, soliciting public comment and consulting with the Assistant Secretary of Commerce for Communications and Information, and then to make a recommendation to the Librarian, who must make a determination whether any classes of copyrighted works should be exempt from the statutory prohibition against circumvention during the three years commencing on that date.

The primary responsibility of the Register and the Librarian in this respect is to assess whether the implementation of technological protection measures that effectively control access to copyrighted works (hereinafter "access-control measures") is diminishing the ability of individuals to use copyrighted works in ways that are otherwise lawful. *Commerce Comm. Report*, at 37. As examples of technological protection measures in effect today, the Commerce Committee offered the use of "password codes" to control authorized access to computer programs and encryption or scrambling of cable programming, videocassettes, and CD-ROMs. *Id.*

The prohibition becomes effective on October 28, 2000, and any exemptions to that prohibition must be in place by that time. Although it is difficult to measure the effect of a future prohibition, Congress intended that the Register solicit input that would enable consideration of a broad range of current or likely future adverse impacts. The

nature of the inquiry is delineated in the statutory areas to be examined, as set forth in section 1201(a)(1)(C):

- (i) The availability for use of copyrighted works;
- (ii) The availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) The effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) Such other factors as the Librarian considers appropriate.

## II. Solicitation of Public Comments and Hearings

On November 24, 1999, the Office initiated the rulemaking procedure with publication of a Notice of Inquiry. 64 FR 66139. The Notice of Inquiry requested written comments from all interested parties, including representatives of copyright owners, educational institutions, libraries and archives, scholars, researchers and members of the public. The Office devoted a great deal of attention in this Notice to setting out the legislative parameters and developing questions related to the criteria Congress had established. The Office was determined to make the comments it received available immediately in order to elicit a broad range of public comment; therefore, it stated a preference for submission of comments in certain electronic formats. *Id.* In response to some commenters' views that the formats permitted were not sufficient, the Office expanded the list of formats in which comments could be submitted. 65 FR 6573 (February 10, 2000). In the same document, the Office extended the comment period: comments would be due by February 17, 2000 and reply comments by March 20, 2000. On March 17, the Office extended the reply comment period to March 31; scheduled hearings to take place in Washington, DC on May 2-4 and in Palo Alto, California, at Stanford University on May 18-19; and set a June 23, 2000 deadline for submission of post-hearing comments. 65 FR 14505 (March 17, 2000). All of these notices were published not only in the *Federal Register*, but also on the Office's website.

In response to the Notice of Inquiry, the Office received 235 initial comments and 129 reply comments. Thirty-four witnesses representing over 50 groups testified at five days of hearings held in either Washington, DC or Palo Alto, California. The Office placed all initial comments, reply comments, optional

written statements of the witnesses and the transcripts of the two hearings on its website shortly after their receipt. Following the hearings, the Office received 28 post-hearing comments, which were also posted on the website. All of these commenters and witnesses are identified in the indexes that appear on the Office's website.

The comments received represent a broad perspective of views ranging from representatives or individuals who urged there should be broad exemptions to those who opposed any exemption; they also included a number of comments about various other aspects of the Digital Millennium Copyright Act. The Copyright Office has now exhaustively reviewed and analyzed the entire record, including all of the comments and the transcripts of the hearings in order to determine whether any class of copyrighted works should be exempt from the prohibition against circumvention during the next three years.<sup>2</sup>

## III. Discussion

### A. The Purpose and Focus of the Rulemaking

#### 1. Purpose of the Rulemaking

As originally reported out of the Senate Judiciary Committee on May 11, 1998, S. Rep. No. 105-190 (1998), and the House Judiciary Committee on May 22, 1998, H.R. Rep. No. 105-551, pt. I (1998), section 1201(a)(1) consisted of only one sentence—what is now the first sentence of section 1201(a)(1): "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." Section 1201(a)(2), like the provision finally enacted, prohibited the manufacture, importation, offering to the public, providing or otherwise trafficking in any technology, product, service, device, or component to circumvent access control measures. Section 1201(a) thus addressed "access control" measures, prohibiting both the conduct of circumventing those measures and devices that circumvent them. Thus, section 1201(a) prohibits both the conduct of circumventing access control measures and trafficking

<sup>2</sup> In referring to the comments and hearing materials, the Office will use the following abbreviations: C-Comment, R-Reply Comment, PH-Post Hearing Comments, T + speaker and date—Transcript (ex. "T Laura Gasaway, 5/18/00") and WS + speaker—Written statements (ex. "WS Vaidhyanathan"). Citations to page numbers in hearing transcripts are to the hard copy transcripts at the Copyright Office. For the hearings in Washington, DC, the pagination of those transcripts differs from the pagination of the versions of the transcript available on the Copyright Office website.

in products, services and devices that circumvent access control measures.

In addition to section 1201(a)(1)'s prohibition on circumvention of access control measures, section 1201 also addressed circumvention of a different type of technological measure. Section 1201(b), in the versions originally reported by the House and Senate Judiciary Committees and in the statute finally enacted, prohibited the manufacture, importation, offering to the public, providing or otherwise trafficking in any technology, product, service, device, or component to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under title 17 in a copyrighted work. The type of technological measure addressed in section 1201(b) includes copy-control measures and other measures that control uses of works that would infringe the exclusive rights of the copyright owner. They will frequently be referred to herein as copy controls. But unlike section 1201(a), which prohibits both the conduct of circumvention and devices that circumvent, section 1201(b) does not prohibit the conduct of circumventing copy control measures. The prohibition in section 1201(b) extends only to devices that circumvent copy control measures. The decision not to prohibit the conduct of circumventing copy controls was made, in part, because it would penalize some noninfringing conduct such as fair use.

In the House of Representatives, the DMCA was sequentially referred to the Committee on Commerce after it was reported out of the Judiciary Committee. The Commerce Committee was concerned that section 1201, in its original form, might undermine Congress' commitment to fair use. Commerce Comm. Report, at 35. While acknowledging that the growth and development of the Internet has had a significant positive impact on the access of students, researchers, consumers, and the public at large to information and that 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 considerable time, resources, and money," *Id.*, the Committee was 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." *Id.* at 36. Possible measures that might lead to

such an outcome included the elimination of print or other hard-copy versions, permanent encryption of all electronic copies and adoption of business models that restrict distribution and availability of works. The Committee concluded that "[i]n 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." *Id.*

In order to address such possible developments, the Commerce Committee proposed a modification of section 1201 which it characterized as a "fail-safe" mechanism. *Id.* As the Committee Report describes it, "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." *Id.*

The "fail-safe" mechanism is this rulemaking. In its final form as enacted by Congress, slightly modified from the mechanism that appeared in the version of the DMCA reported out of the Commerce Committee, the Register is to conduct a rulemaking proceeding and, after consulting with the Assistant Secretary for Communications and Information of the Department of Commerce, recommend to the Librarian whether he should conclude "that persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under [section 1201(a)(1)(A)] in their ability to make noninfringing uses under [Title 17] of a particular class of copyrighted works." 17 U.S.C. 1201(a)(1)(C). "The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period." 17 U.S.C. 1201(a)(1)(C).

The Commerce Committee offered additional guidance as to the task of the Register and the Librarian in this rulemaking. "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 \* \* \*. 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." Commerce Comm. Report, at 37. Accord: Staff of House Committee on the Judiciary, 105th Cong., Section-By-Section Analysis of H.R. 2281 as Passed by the United States House of Representatives on August 4, 1998, (hereinafter House Manager's Report) (Rep. Coble)(Comm. Print 1998), at 6. The Committee observed that the effective date of section 1201(a)(1) was delayed for two years in order "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." Commerce Comm. Report, at 37.

Thus, the task of this rulemaking appears to be to determine whether the availability and use of access control measures has already diminished or is about to diminish the ability of the public to engage in the lawful uses of copyrighted works that the public had traditionally been able to make prior to the enactment of the DMCA. As the Commerce Committee Report stated, in examining the factors set forth in section 1201(a)(1)(C), the focus must be 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." *Id.*

## 2. The Necessary Showing

The language of section 1201(a)(1) does not offer much guidance as to the respective burdens of proponents and opponents of any classes of works to be exempted from the prohibition on circumvention. Of course, it is a general rule of statutory construction that exemptions must be construed narrowly in order to preserve the purpose of a statutory provision, and that rule is applied in interpreting the copyright law. *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000). Moreover, the burden is on the proponent of the exemption to make the case for exempting any particular class of works from the operation of section 1201(a)(1). See 73 Am. Jur. 2d 313 (1991) ("[s]tatutes granting exemptions from their general operation [to] be strictly construed, and any doubt must be resolved against the one asserting the exemption.") Indeed, the House Commerce Committee stated that "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." Commerce Comm. Report, at 37 (emphasis added).<sup>3</sup>

The legislative history makes clear that a determination to exempt a class of works from the prohibition on circumvention must be based on a determination that the prohibition has a substantial adverse effect on noninfringing use of that particular class of works. The Commerce Committee noted that the rulemaking proceeding is to focus on "distinct, verifiable, and measurable impacts, and should not be based upon de minimis impacts." Commerce Comm. Report, at 37. "If the rulemaking has produced insufficient evidence to determine whether there have been adverse impacts with respect to particular classes of copyrighted works, the circumvention prohibition should go into effect with respect to those classes." *Id.* at 38. Similarly, the House Manager's Report stated that "[t]he focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses," and suggested that "mere inconveniences, or individual cases \* \* \* do not rise to the level of a substantial adverse impact." House Manager's Report, at 6.<sup>4</sup> See also *Connecticut Department of Public Utility Control v. Federal Communications Commission*, 78 F.3d 842, 851 (2d Cir. 1996) ("It is reasonable

<sup>3</sup> The Commerce Committee proposal would have placed responsibility for the rulemaking in the hands of the Secretary of Commerce. As finally enacted, the DMCA shifted that responsibility to the Librarian, upon the recommendation of the Register.

<sup>4</sup> Some commenters have suggested that the House Manager's Report is entitled to little deference as legislative history. See, e.g., PH18, p. 3. However, because that report is consistent with the Commerce Committee Report, there is no need in this rulemaking to determine whether the Manager's Report is entitled to less weight than the Commerce Committee Report. Some critics of the Manager's Report have objected to its statement that the focus of this proceeding should be on whether there is a "substantial adverse impact" on noninfringing uses. However, they have failed to explain how this statement is anything other than another way of saying what the Commerce Committee said when it said the determination should be based on "distinct, verifiable, and measurable impacts, and should not be based upon de minimis impacts."

to characterize as 'substantial' the burden faced by a party seeking an exemption from a general statutory rule").

Although future adverse impacts may also be considered, the Manager's Report states that "the determination should be based upon anticipated, rather than actual, adverse impacts only in extraordinary circumstances in which the evidence of likelihood of future adverse impact during that time period is highly specific, strong and persuasive. Otherwise, the prohibition would be unduly undermined." *Id.* Although the Commerce Committee Report does not state how future adverse impacts are to be evaluated (apart from a single reference stating that in categories where adverse impacts have occurred or "are likely to occur," an exemption should be made, Commerce Comm. Report at 38), the Committee's discussion of "distinct, verifiable and measurable impacts" suggests that it would require a similar showing with respect to future adverse impact.

The legislative history also requires the Register and Librarian to disregard any adverse effects that are caused by factors other than the prohibition against circumvention. The House Manager's Report is instructive:

The focus of the rulemaking proceeding must remain on whether the prohibition on circumvention of technological protection measures (such as encryption or scrambling) has caused any substantial adverse impact on the ability of users to make non-infringing uses. Adverse impacts that flow from other sources \* \* \* or that are not clearly attributable to such a prohibition, are outside the scope of the rulemaking.

House Manager's Report, at 6. The House Commerce Committee came to a similar conclusion, using similar language. Commerce Comm. Report, at 37.

In fact, some technological protection measures may mitigate adverse effects. The House Manager's Report notes that:

In assessing the impact of the implementation of technological measures, and of the law against their circumvention, the rule-making proceedings should consider the positive as well as the adverse effects of these technologies on the availability of copyrighted materials. The technological measures—such as encryption, scrambling, and electronic envelopes—that this bill protects can be deployed, not only to prevent piracy and other economically harmful unauthorized uses of copyrighted materials, but also to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of legitimate uses of those materials by individuals.

House Manager's Report, at 6.

Another mitigating factor may arise when a work as to which the copyright

owner has instituted a technological control is also available in formats that are not subject to technological protections. For example, a work may be available in electronic format only in encrypted form, but may also be available in traditional hard copy format which has no such technological restrictions on access. The availability without restriction in the latter format may alleviate any adverse effect that would otherwise result from the technological controls utilized in the electronic format. The availability of works in such other formats is to be considered when exemptions are fashioned. *Id.* at 7.

### 3. Determination of "Class of Works"

One of the key issues discussed in comments and testimony was how a "class" of works is to be defined. The Office's initial notice of inquiry highlighted this issue, asking for comments from the public on the criteria to be used in determining what a "class of works" is and on whether works could be classified in part based on the way in which they are being used. See questions 16, 17 and 23, 64 FR at 66143. A joint submission by a number of library associations took the position that the Librarian should adopt a "function-based" definition of classes of works." C162, p. 32. The same submission stated that "the class of works should be defined, in part, according to the ways they are being used because that is precisely how the limitations on the otherwise exclusive rights of copyright holders are phrased," *Id.*, p. 36, and concluded that "all categories of copyrighted works should be covered by this rulemaking." *Id.*, p. 38. In contrast, a coalition of organizations representing copyright owners argued for a narrower approach, rejecting a focus on particular types of uses of works or on particular access control technologies. R112, p. 10. One association of copyright owners argued that a "class" should not be defined by reference to any particular medium (such as digital versatile discs, or DVD's), but rather by reference to "a type or types of works." R59, p. 8. Many representatives of copyright owners repeated the legislative history that "the particular class of copyrighted works" be a narrow and focused subset of the broad categories of works of authorship than is [sic] identified in section 102 of the Copyright Act (17 U.S.C. 102)." See, e.g., *Id.*, (quoting Commerce Comm. Report, at 38). A representative of a major copyright owner took the position that "defining 'classes' of works is neither feasible nor appropriate" and that "[b]efore there is any movement in

the direction of exempting certain works or 'classes' of works from the prohibition against circumvention, those who support such exemption should come forward with proof that users who desire to make non-infringing uses or avail themselves of the fair use defense are prevented from doing so by the technological protections." C43, p.6.

Based on a review of the statutory language and the legislative history, the view that a "class" of works can be defined in terms of the status of the user or the nature of the intended use appears to be untenable. Section 1201(a)(1)(B) refers to "a copyrighted work which is in a particular class of works." Section 1201(a)(1)(C) refers to "a particular class of copyrighted works." Section 1201(a)(1)(D) "any class of copyrighted works." This statutory language appears to require that the Librarian identify a "class of works" based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works. The dictionary defines "class" as "a group, set or kind sharing common attributes." Webster's New Collegiate Dictionary 211 (1995).

Moreover, the phrase "class of works" connotes that the common attributes relate to the nature of authorship in the works. Although the Copyright Act does not define "work," the term is used throughout the copyright law to refer to a work of authorship, rather than to a material object on which the work appears or to the readers or users of the work. See, e.g., 17 U.S.C. 102(a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, \* \* \*) (emphasis added) and the catalog of the types of works protected by copyright set forth in section 102(a)(1)-(8) ("literary works," "musical works," "dramatic works," etc.).

Nevertheless, the statutory language is arguably ambiguous, and one could imagine an interpretation of section 1201(a)(1) that permitted a class of works to be defined in terms of criteria having nothing to do with the intrinsic qualities of the works. In such a case, resort to legislative history might clarify the meaning of the statute. In this case, the legislative history appears to leave no other alternative than to interpret the statute as requiring a "class" to be defined primarily, if not exclusively, by reference to attributes of the works themselves.

The Commerce Committee Report addressed the issue of determining a class of works:

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 [sic] is identified in section 102 of the Copyright Act (17 U.S.C. §102).

Commerce Comm. Report, at 38.<sup>5</sup>

A "narrow and focused subset of the broad categories of works of authorship \* \* \* identified in section 102" presumably must use, as its starting point, the categories of authorship set forth in section 102: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.

Moreover, the Commerce Committee Report states that the task in this rulemaking proceeding is to determine whether the prevalence of access control measures, "with respect to *particular categories* of copyrighted materials, is diminishing the ability of individuals to use these works in ways that are otherwise lawful." Commerce Comm. Report, at 37 (emphasis added). In fact, the Report refers repeatedly to "categories" of works in connection with the findings to be made in this rulemaking. See *Id.*, at 36 ("individual users of a particular category of copyrighted materials") ("whether enforcement of the regulation should be temporarily waived with regard to particular categories of works") ("any particular category of copyrighted materials") ("assessment of adverse impacts on particular categories of works"), and 38 ("Only in categories as to which the Secretary finds that adverse impacts have occurred"). Because the term "category" of works

has a well-understood meaning in the copyright law, referring to the categories set forth in section 102, the conclusion is inescapable that the starting point for any definition of a "particular class" of works in this rulemaking must be one of the section 102 categories.<sup>6</sup>

The views of the Judiciary Committee are in accord with those expressed in the Commerce Committee Report. The House Manager's Report uses very similar words to describe how a "class of works" is to be determined:

Deciding the scope or boundaries of a "particular class" of copyrighted works as to which the prohibition contained in section 1201(a)(1) has been shown to have had an adverse impact is an important issue to be determined during the rulemaking proceedings. The illustrative list of categories appearing in section 102 of Title 17 is only a starting point for this decision. For example, the category of "literary works" (17 USC 102(a)(1)) embraces both prose creations such as journals, periodicals or books, and computer programs of all kinds. It is exceedingly unlikely that the impact of the prohibition on circumvention of access control technologies will be the same for scientific journals as it is for computer operating systems; thus, these two categories of works, while both "literary works," do not constitute a single "particular class" for purposes of this legislation. Even within the category of computer programs, the availability for fair use purposes of PC-based business productivity applications is unlikely to be affected by laws against circumvention of technological protection measures in the same way as the availability for those purposes of videogames distributed in formats playable only on dedicated platforms, so it is probably appropriate to recognize different "classes" here as well.

House Manager's Report, at 7.

The House Manager's Report continues:

At the same time, the Secretary should not draw the boundaries of "particular classes" too narrowly. For instance, the section 102 category "motion pictures and other audiovisual works" may appropriately be subdivided, for purposes of the rulemaking, into classes such as "motion pictures," "television programs," and other rubrics of similar breadth. However, it would be inappropriate, for example, to subdivide overly narrowly into particular genres of motion pictures, such as Westerns, comedies, or live action dramas. Singling out specific types of works by creating in the rulemaking process "particular classes" that are too narrow would be inconsistent with the intent of this bill.

*Id.*

<sup>6</sup>The legislative history of the Copyright Act of 1976 supports the conclusion that there is a close relation between the section 102 categories and a "class" of work. The authoritative report of the House Judiciary Committee, in discussing the section 102 categories of works, used the term "class" as a synonym for "category." See H.R. Rep. No. 94-1476, at 53 (1976).

The conclusion to be drawn from the legislative history is that the section 102 categories of works are, at the very least, the starting point for any determination of what a "particular class of work" might be. That is not to say that a "class" of works must be identical to a "category." In fact, that usually will not be the case. A "class" of works might include works from more than one category of works; one could imagine a "class" of works consisting of certain sound recordings and musical compositions, for example. More frequently, a "class" would constitute some subset of a section 102 category, such as the Judiciary Committee's example of "television programs."

A rigid adherence to defining "class" solely by reference to section 102 categories or even to inherent attributes of the works themselves might lead to unjust results in light of the fact that the entire "class" must be exempted from section 1201(a)(1)'s anticircumvention provision if the required adverse impact is demonstrated. For example, if a showing had been made that users of motion pictures released on DVD's are adversely affected in their ability to make noninfringing uses of those works, it would be unfortunate if the Librarian's only choice were to exempt motion pictures. Limiting the class to "motion pictures distributed on DVD's," or more narrowly to "motion pictures distributed on DVD's using the content scrambling system of access control" would be a more just "and permissible" classification. Such a classification would begin by reference to attributes of the works themselves, but could then be narrowed by reference to the medium on which the works are distributed, or even to the access control measures applied to them. But classifying a work solely by reference to the medium on which the work appears, or the access control measures applied to the work, seems to be beyond the scope of what "particular class of work" is intended to be. And classifying a work by reference to the type of user or use (e.g., libraries, or scholarly research) seems totally impermissible when administering a statute that requires the Librarian to create exemptions based on a "particular class of works." If Congress had wished to provide for exemptions based on the status of the user or the nature of the use—criteria that would be very sensible—Congress could have said so clearly. The fact that the issue of noninfringing uses was before Congress and the fact that Congress clearly was seeking, in section 1201, to create exemptions that would permit noninfringing uses, make it clear that

<sup>5</sup>A leading treatise draws the following conclusion from this language:

It would seem, therefore, that the language should be applied to discrete subgroups. If users of physics textbooks or listeners to Baroque concerti, for example, find themselves constricted in the new Internet environment, then some relief will lie. If, on the other hand, the only unifying feature shared by numerous disgruntled users is that each is having trouble accessing copyrighted works, albeit of different genres, then no relief is warranted. 1 Nimmer on Copyright § 12A.03[A][1][b] (Copyright Protection Systems Special Pamphlet).

Congress had every opportunity and motive to clarify that such uses could be ingredients of the definition of "class" if that was what Congress intended. Yet the fact that Congress selected language in the statute and legislative history that avoided suggesting that classes of works could be defined by reference to users or uses is strong evidence that such classification was not within Congress' contemplation.

In this rulemaking, exemptions for two classes of works are recommended. The first class, "Compilations consisting of lists of websites blocked by filtering software applications," fits comfortably within the approach to classification outlined herein. The second class, "Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence," is a somewhat less comfortable fit. It includes all literary works (a section 102 category) and specifically mentions two subclasses of literary works, but narrows the exemption by reference to attributes of the technological measures that control access to the works. Such classification probably reaches the outer limits of a permissible definition of "class" under the approach adopted herein.

#### *B. Consultation With Assistant Secretary of Commerce for Communications and Information*

As is required by section 1201(a)(1)(C), the Register has consulted with the Assistant Secretary for Communications and Information in the Department of Commerce. The Assistant Secretary is the Administrator of the National Telecommunications and Information Administration (NTIA). Discussions with the Assistant Secretary and the NTIA staff have taken place throughout this rulemaking process. In furtherance of the consultative process, on September 29, 2000, the Assistant Secretary presented a letter to the Register detailing his views. That letter has been forwarded to the Librarian. After full and thorough consideration of and discussions with the Assistant Secretary's office on these views, the Register includes the following report and comment on the Assistant Secretary's perspective in this recommendation to the Librarian.

The Assistant Secretary stated that his principal concern is to ensure that the Librarian will preserve fair use principles in this new digital age. The concerns expressed in his letter quoted from and restated many of the concerns that were presented in the House Commerce Committee Report. The

Assistant Secretary noted that the Commerce Committee was concerned that the anticircumvention prohibition of section 1201(a)(1) might have adverse consequences on fair uses of copyrighted works protected by technological protection measures, particularly by librarians and educators. He echoed the fears of the Commerce Committee that a legal framework may be developing that would "inexorably create a pay-per-use society." He stated that the "right" to prohibit circumvention should be qualified in order to maintain a balance between the interests of content creators and information users, by means of carefully drawn exemptions from the anticircumvention provision.

Since fair use, as codified in 17 U.S.C. 107, is not a defense to the cause of action created by the anticircumvention prohibition of section 1201, the Assistant Secretary urges the Register to follow the House Commerce Committee's intent to provide for exemptions analogous to fair use. He advises the Register to preserve fair use principles by crafting exemptions that are grounded in these principles in order to promote inclusion of all parts of society in the digital economy and prevent a situation in which information crucial to supporting scholarship, research, comment, criticism, news reporting, life-long learning, and other related lawful uses of copyrighted information is available only to those with the ability to pay or the expertise to negotiate advantageous licensing terms.

The Assistant Secretary expresses support for commenters in this proceeding who believed that the term "class" should not be interpreted as "coextensive" with categories of original works of authorship, as that term is used in section 102(a) of the Copyright Act. He states that since the statute and legislative history provide little guidance on the meaning of the term "class of works" and since section 1201(a)(1)(C) instructs the Librarian to examine considerations of use that are similar to fair use analysis, the classes of exempted works should be fashioned based on a factual examination of the uses to which copyrighted materials are put.

In order to craft an exemption that will preserve fair uses, he concludes that the determination of exempted classes of works should include a factual examination of the uses to which copyrighted materials are put. With this in mind, he endorses, "as a starting point, the exception proposed by the library and academic communities." In particular, he would support the

crafting of the following exemption: "Works embodied in copies that have been lawfully acquired by users or their institutions who subsequently seek to make noninfringing uses thereof."

The Register has subsequently sought and received clarification of some of the points made in the Assistant Secretary's letter. In particular, the Register has asked (1) for the Assistant Secretary's views on whether a "class of works" can be defined or determined by reference to the uses of the works in that class, rather than by reference to attributes of the works themselves, and (2) that the Assistant Secretary identify any comments or testimony in the record of this rulemaking proceeding that he believes presented any evidence that technological measures that control access to copyrighted works actually have caused or in the next three years will cause substantial adverse impacts on the ability of users to make noninfringing uses of works in the proposed class of works that he has endorsed.

With respect to how a "class of works" is to be defined or determined, NTIA responded by stating that fair use has to be a part of any discussion focusing on exemptions to the DMCA's anticircumvention prohibition, and that because the principle of fair use is grounded in a factual examination of the use to which copyrighted materials are put, it would be reasonable to include a similar examination in fashioning a class of exempted works under 1201(a)(1)(C).

In response to the request to identify comments and testimony that present evidence of substantial adverse impacts on the ability of users to make noninfringing uses of "works embodied in copies that have been lawfully acquired by users or their institutions who subsequently seek to make noninfringing uses thereof," NTIA cited one comment and the testimony of several witnesses. NTIA also questioned whether a showing of "substantial" adverse impact is required, observing that "Nowhere in section 1201(a)(1)(C) does the word 'substantial' appear" and asserting that a showing of "reasonably anticipated impacts" should be sufficient.

The views of the Assistant Secretary have been seriously considered in the preparation of these recommendations to the Librarian. Because the exemption endorsed by the Assistant Secretary (see discussion above) is not supported in this recommendation, an explanation of the reasons is in order.

At the outset of these comments on the Assistant Secretary's views, it should be understood that there is no



disagreement with the Assistant Secretary or the Commerce Committee on the need to preserve the principles of fair use and other noninfringing uses in the digital age. The Register's disagreement with the Assistant Secretary's proposals arises from the interpretation of both the statutory language of section 1201(a)(1)(C) and a review of the record in this proceeding.

First, the Assistant Secretary's proposals are based on—and necessarily require adoption of—an interpretation of the statutory phrase "particular class of copyrighted works" that the Register cannot support. As stated above in section III.A.3, a "particular class of copyrighted works" must relate primarily to attributes of the copyrighted works themselves and not to factors that are external to the works, e.g., the material objects on which they are fixed or the particular technology employed on the works. Similarly, neither the language of the statute nor the legislative history provide a basis for an interpretation of an exemption of a class of works that is "use-oriented."

While the Register was required to "examine" the present or likely adverse effects on uses, and in particular noninfringing uses, that inquiry had the express goal of designating exemptions that were based on classes of copyrighted works. The only examples cited and guidance provided in the legislative history lead the Register to conclude that a class must be defined primarily by reference to attributes of the works themselves, typically based upon the categories set forth in section 102(a) or some subset thereof, e.g., motion pictures or video games.

As NTIA observes, it is appropriate to examine the impact of access control measures on fair use in determining what classes of works, if any, should be subject to an exemption. But the Assistant Secretary has not explained how a "class of works" can be defined or determined without any reference whatsoever to attributes of the works themselves, and solely by reference to the status of the persons who acquire copies of those works. While fair use is relevant in determining what classes should be exempted, its relevance relates to the inquiry whether users of a particular class of works (as defined above, in section III.A.3.) are adversely affected in their ability to make noninfringing uses (such as fair use) of works in that class.

The specific exemption endorsed by the Assistant Secretary, and the reasons why that exemption cannot be adopted, are discussed below. See section III.E.9. Those reasons will not be repeated at length here. As already noted, the

proposal does not constitute a "particular class of copyrighted work" as required by the statute. Moreover, the record does not reveal that there have been adverse effects on noninfringing uses that such an exemption would remedy. Finally, this approach would, in effect, revive a version of section 1201(a)(1) focusing on persons who have gained initial lawful access that was initially enacted by the House of Representatives but ultimately rejected by Congress.

NTIA's observation that the word "substantial" does not appear in section 1201(a)(1)(C) does not require the conclusion, suggested by NTIA, that a showing of substantial harm is not required. As noted above (section III.A.2) the House Manager's Report states that the focus of this rulemaking should be on whether the prohibition on circumvention of technological protection measures has had a substantial adverse impact on the ability of users to make non-infringing uses. Although the Commerce Committee Report does not use the word "substantial," its direction to make exemptions based upon "distinct, verifiable, and measurable impacts, and \* \* \* not \* \* \* upon *de minimis* impacts" requires a similar showing.

Moreover, while NTIA asserts that an exemption may be made based on a finding of "likely adverse effects" or "reasonably anticipated impacts," it appears that a similar showing of substantial likelihood is required with respect to such future harm. See section III.A.2 above. "Likely"—the term used in section 1201 to describe the showing of future harm that must be made—means "probable," "in all probability," or "having a better chance of existing or occurring than not." Black's Law Dictionary 638 (Abridged 6th ed. 1991).

The comments and testimony identified by NTIA in support of the exemption are discussed below in section III.E.9.

For the foregoing reasons, the Assistant Secretary, in supporting this exemption proposed by libraries and educators, endorses an exemption that is beyond the scope of the Librarian's authority. While the proposed exemption addresses important concerns, it is a proposal that would be more appropriately suited for legislative action rather than for the regulatory process set forth in section 1201(a)(1)(C) and (D). In the absence of clarification by Congress, a "particular class of works" cannot be interpreted so expansively.

Some of the issues raised by the Assistant Secretary are also likely to be addressed in a joint study by the

Assistant Secretary and the Register pursuant to section 104 of the DMCA. See 65 FR 35673 (June 5, 2000). It is possible that this study will result in legislative recommendations that might more appropriately resolve the issues raised by the Assistant Secretary.

### C. Conclusions Regarding This Rulemaking and Summary of Recommendations

After reviewing all of the comments and the testimony of the witnesses who appeared at the hearings, the Register concludes that a case has been made for exemptions relating to two classes of works:

(1) Compilations consisting of lists of websites blocked by filtering software applications; and

(2) Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

These recommendations may seem modest in light of the sweeping exemptions proposed by many commenters and witnesses, but they are based on a careful review of the record and an application of the standards governing this rulemaking procedure. While many commenters and witnesses made eloquent policy arguments in support of exemptions for certain types of works or certain uses of works, such arguments in most cases are more appropriately directed to the legislator rather than to the regulator who is operating under the constraints imposed by section 1201(a)(1).

Many of the proposed classes do not qualify for exemption because they are not true "classes of works" as described above in section III.A.3. The proposed exemptions discussed below in section III.E.2, 5, 6, 7, 8, and 9 all suffer from that frailty to varying degrees. In many cases, proponents attempted to define classes of works by reference to the intended uses to be made of the works, or the intended user. These criteria do not define a "particular class of copyrighted work."

For almost all of the proposed classes, the proponents failed to demonstrate that there have been or are about to be adverse effects on noninfringing uses that have "distinct, verifiable, and measurable impacts." See Commerce Comm. Report, at 37. In most cases, those proponents who presented actual examples or experiences with access control measures presented, at best, cases of "mere inconveniences, or individual cases, that do not rise to the level of a substantial adverse impact." See House Manager's Report, at 6. As one leading proponent of exemptions



admitted, the inquiry into whether users of copyrighted works are likely to be adversely effected by the full implementation of section 1201(a)(1) is necessarily "speculative since it entails a prediction about the future." T Jaszi, 5/2/00, pp. 11-12.

It should come as no surprise that the record supports so few exemptions. The prohibition on circumventing access control measures is not yet even in effect. Witnesses who asserted the need to circumvent access control measures were unable to cite any actual cases in which they or others had circumvented access controls despite the fact that such circumvention will not be unlawful until October 28, 2000. T Neal, 5/4/00, p. 103; T Cohen, 5/4/00, pp. 100-01.<sup>7</sup>

The legislative history reveals that Congress anticipated that exemptions would be made only in exceptional cases. See House Manager's Report, at 8 (it is "not required to make a determination under the statute with respect to any class of copyrighted works. In any particular 3-year period, it may be determined that the conditions for the exemption do not exist. Such an outcome would reflect that the digital information marketplace is developing in the manner which is most likely to occur, with the availability of copyrighted materials for lawful uses being enhanced, not diminished, by the implementation of technological measures and the establishment of carefully targeted legal prohibitions against acts of circumvention."); Commerce Comm. Report, at 36 ("Still, the Committee is concerned that marketplace realities may someday dictate a different outcome, resulting in less access \* \* \*. 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 \* \* \*"; "a 'fail-safe mechanism' is required"; "This mechanism would \* \* \* 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.") (emphasis added).

The two recommended exemptions do constitute "particular classes of copyrighted works," and genuine harm to the ability to engage in noninfringing

<sup>7</sup>One witness testified that "there have been times that we've had to circumvent," but on examination, it appears that the example the witness gave would not constitute circumvention of an access control measure. See T Gasaway, 5/18/00, pp. 49-50.

activity has been demonstrated. These exemptions will remain in effect for three years. In the next rulemaking, they will be examined *de novo*, as will any other proposed exemption including exemptions that were rejected in this proceeding. If, in the next three years, copyright owners impose access controls in unreasonable ways that adversely affect the ability of users to engage in noninfringing uses, it is likely that the next rulemaking will result in more substantial exemptions.

Ultimately, the task in this rulemaking proceeding is to balance the benefits of technological measures that control access to copyrighted works against the harm caused to users of those works, and to determine, with respect to any particular class of works, whether an exemption is warranted because users of that class of works have suffered significant harm in their ability to engage in noninfringing uses. See House Managers Report at 7 (decision "should give appropriate weight to the deployment of such technologies in evaluating whether, on balance, the prohibition against circumvention of technological measures has caused an adverse impact on the specified categories of users of any particular class of copyrighted materials"). The four factors specified in section 1201(a)(1)(C) reflect some of the significant considerations that must be balanced: Are access control measures increasing or restricting the availability of works to the public in general? What impact are they having on the nonprofit archival, preservation, and educational activities? What impact are they having on the ability to engage in fair use? To what extent is circumvention of access controls affecting the market for and value of copyrighted works?

The information submitted in this, the first rulemaking proceeding under section 1201(a)(1), indicates that in most cases thus far the use of access control measures has sometimes enhanced the availability of copyrighted works and has rarely impeded the ability of users of particular classes of works to make noninfringing uses. With the exception of the two classes recommended for exemption, the balance of all relevant considerations favors permitting the prohibition against circumvention to go into effect as scheduled.

#### Licensing

Many of the complaints aired in this rulemaking actually related primarily to licensing practices rather than technological measures that control access to works. Some witnesses expressed concerns about overly restrictive licenses, unwieldy licensing

terms, restrictions against use by unauthorized users, undesirable terms and prices, and other licensing restrictions enforced by technological protection measures. See, e.g., T Gasaway, 5/18/00; T Coyle, 5/18/00; T Weingarten, 5/19/00. One of these witnesses admitted that "some of the concerns today are just pure licensing concerns." T Gasaway, 5/18/00, p. 65.

It appears that in those cases, the licensees often had the choice of negotiating licenses for broader use, but did not choose to do so. See T. Clark, 5/3/00, p. 99; T Neal, 5/4/00, p. 133; T Gasaway, 5/18/00, p. 38. Commenters and witnesses who complained about licensing terms did not demonstrate that negotiating less restrictive licenses that would accommodate their needs has been or will be prohibitively expensive or burdensome. Nor has there been a showing that unserved persons not permitted to gain access under a particular license (e.g., a member of the public wishing to gain access to material at a university library when the library's license restricts access to students and faculty) could not obtain access to the restricted material in some other way or place.

It is appropriate to consider harm emanating from licensing in determining whether users of works have been adversely affected by the prohibition on circumvention in their ability to make noninfringing uses. This triennial rulemaking is to "monitor developments in the marketplace for copyrighted materials," Commerce Comm. Report, at 36, and developments in licensing practices are certainly relevant to that inquiry. If, for example, licensing practices with respect to particular classes of works make it prohibitively burdensome or expensive for users, such as libraries and educational institutions, to negotiate terms that will permit the noninfringing uses, and if the effect of such practices is to diminish unjustifiably access for lawful purposes, see Commerce Comm. Report, at 36, exemptions for such classes may be justified. If copyright owners flatly refuse to negotiate licensing terms that users need in order to engage in noninfringing uses, an exemption may be justified. But such a case has not been made in this proceeding.

Many commenters expressed concerns that, in the words of one witness, we are "on the brink of a pay-per-use universe." T Jaszi, 5/2/00, p. 70. The Assistant Secretary for Communications and Information shares that concern, observing that the Commerce Committee Report had warned against the development of a

"legal framework that would inexorably create a 'pay-per-use' society." See Commerce Comm. Report, at 26.

However, a "pay-per-use" business model may be, in the words of the House Manager's Report, "use-facilitating." House Manager's Report, at 7. The Manager's Report refers to access control technologies that are "designed to allow access during a limited time period, such as during a period of library borrowing" or that allow "a consumer to purchase a copy of a single article from an electronic database, rather than having to pay more for a subscription to a journal containing many articles the consumer does not want." *Id.* For example, if consumers are given a choice between paying \$100 for permanent access to a work or \$2 for each individual occasion on which they access the work, many will probably find it advantageous to elect the "pay-per-use" option, which may make access to the work much more widely available than it would be in the absence of such an option. The comments and testimony of SilverPlatter Information Inc., demonstrate that the flexibility offered by such "persistent" access controls can actually enhance use. Of course, one can imagine pay-per-use scenarios that are likely to make works less widely available as well.

The record in this proceeding does not reveal that "pay-per-use" business models have, thus far, created the adverse impacts on the ability of users to make noninfringing uses of copyrighted works that would justify any exemptions from the prohibition on circumvention. If such adverse impacts occur in the future, they can be addressed in a future rulemaking proceeding.

#### D. The Two Exemptions

##### 1. Compilations Consisting of Lists of Websites Blocked by Filtering Software Applications

Certain software products, often known as "filtering software" or "blocking software," restrict users from visiting certain internet websites. These software products include compilations consisting of lists of websites to which the software will deny access. Schools, libraries, and parents may choose to use such software for the purpose of preventing juveniles' access to pornography or other explicit or inappropriate materials on their computers. R56. At least one court that has addressed the use of such software has concluded that requiring use of the software in public libraries offends the First Amendment. See, e.g., *Mainstream*

*Loudoun v. Board of Trustees of the Loudoun County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998); See also Tenn. Op. Atty. Gen. No. 00-030 (2000). On the other hand, the Supreme Court has suggested that availability of such software for use by parents to prevent their children from gaining access to objectionable websites is a positive development. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 876-77 (1997); *United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878, 1887 (2000).

Critics charge that some filtering programs unfairly block sites that do not contain undesirable material and therefore should not be filtered. One commenter alleged that such programs have an error rate of 76%. R56 at 6. Another commenter described the "long history of errors in blocking sites," and asserted that the software manufacturers have not responded appropriately. R26. The names of blocked websites are compiled into lists which are protected by copyright as compilations. Several commenters assert that manufacturers of filtering software encrypt the lists naming the targeted sites and that they are not made available to others, including the operators of the targeted sites themselves. R56. These commenters assert that they have no alternative but to decrypt the encrypted lists in order to learn what websites are included in those lists. Persons have already decrypted the lists for the purpose of commenting on or criticizing them. R56. One commenter cites an injunction against authors of a program decrypting the list of blocked websites. R26. See *Microsystems Software, Inc. v. Scandinavia Online AB*, No. 00-1503 (1st Cir. Sept. 27, 2000). Such acts of decryption would appear to violate 1201(a)(1) if it took effect without an exemption for these activities.

This does appear to present a problem for users who want to make noninfringing uses of such compilations, because reproduction or display of the lists for the purpose of criticizing them could constitute fair use. The interest in accessing the lists in order to critique them is demonstrated by court cases, websites devoted to the issue, and a fair number of commenters. See generally R73 (Computer Professionals for Social Responsibility); R38; PH20; and PH5 (California Association of Library Trustees and Commissioners, reverse filtering); WS Vaidhyanathan. There is uncontroverted evidence in this record that the lists are not available elsewhere. No evidence has been presented that there is not a problem with respect to lists of websites blocked by filtering software, or that

permitting circumvention of technological measures that control access to such lists would have a negative impact on any of the factors set forth in section 1201(A)(1)(C). The commenters assert that there is no other legitimate way to obtain access to this information. No one else on the record has asserted otherwise.

A review of the factors listed in 1201(a)(1)(C) supports the creation of this exemption. Although one can speculate that the availability of technological protection measures that deny access to the lists of blocked websites might be of benefit to the proprietors of filtering software, and might even increase the willingness of those proprietors to make the software available for use by the public, no commenters or witnesses came forward to make such an assertion. No information was presented relating to the use of either the filtering software or the lists of blocked websites for nonprofit archival, preservation and educational purposes. Nor was any information presented relating to whether the circumvention of technological measures preventing access to the lists has had an impact on the market for or value of filtering software or the compilations of objectionable websites contained therein. However, a persuasive case was made that the existence of access control measures has had an adverse effect on criticism and comment, and most likely news reporting, and that the prohibition on circumvention of access control measures will have an adverse effect.

Thus, it appears that the prohibition on circumvention of technological measures that control access to these lists of blocked sites will cause an adverse effect on noninfringing users since persons who wish to criticize and comment on them cannot ascertain which sites are contained in the lists unless they circumvent. The case has been made for an exemption for compilations consisting of lists of websites blocked by filtering software applications.

##### 2. Literary Works, Including Computer Programs and Databases, Protected by Access Control Mechanisms That Fail to Permit Access Because of Malfunction, Damage or Obsolescence

This designation of class of works is intended to exempt users of software, databases and other literary works in digital formats who are prevented from accessing such works because the access control protections are not functioning in the way that they were intended. In the course of this rulemaking

proceeding, a number of users, and in particular consumers of software and users of compilations, expressed concerns about works which they could not access even though they were authorized users, due to the failure of access control mechanisms to function properly.

Substantial evidence was presented on this issue, in particular relating to the use of "dongles," hardware locks attached to a computer that interact with software programs to prevent unauthorized access to that software. C199. One commenter attached numerous letters and news articles to his submission and testimony, documenting the experience of users whose dongles become damaged or malfunction. It appears that in such instances, the vendors of the software may be nonresponsive to requests to replace or repair the dongle, or may require the user to purchase either a new dongle or an entirely new software package, usually at a substantial cost. In some cases, the vendors have gone out of business, and the user has had no recourse for repair or replacement of the dongle.

Libraries and educational institutions also stated that they have experienced instances where materials they obtained were protected by access controls that subsequently malfunctioned, and they could not obtain timely relief from the copyright owner. R34, R75 (National Library of Medicine), R111 (National Agricultural Library). Similarly, libraries stated that there have been instances where material has been protected by technological access protections that are obsolete or are no longer supported by the copyright owner. *Id.*

No evidence has been presented to contradict the evidence of problems with malfunctioning, damaged or obsolete technological measures. Nor has evidence been presented that the marketplace is likely to correct this problem in the next three years.

This appears to be a genuine problem that the market has not adequately addressed, either because companies go out of business or because they have insufficient incentive to support access controls on their products at some point after the initial sale or license. In cases where legitimate users are unable to access works because of damaged, malfunctioning or obsolete access controls, the access controls are not furthering the purpose of protecting the work from unauthorized users. Rather, they are preventing authorized users from getting the access to which they are entitled. This prevents them from making the noninfringing uses they

could otherwise make. This situation is particularly troubling in the context of libraries and educational institutions, who may be prevented from engaging in noninfringing uses of archiving and preservation of works protected by access controls that are obsolete or malfunctioning. In effect, it puts such users in a position where they cannot obtain access; nor, under 1201(a)(1), would they be permitted to circumvent the access controls to make noninfringing uses of the work unless they fall within an exemption.

Not only does such a result have an adverse impact on noninfringing uses, but it also does not serve the interests of copyright owners that 1201(a)(1) was meant to protect. In almost all cases where this exemption will apply, the copyright owner will already have been compensated for access to the work. It is only when the access controls malfunction that the exemption will come into effect. This does not cause significant harm to the copyright owner. Moreover, authorized users of such works are unlikely to circumvent the access controls unless they have first sought but failed to receive assistance from the copyright owner, since circumvention is likely to be more difficult and time-consuming than obtaining assistance from a copyright owner who is responsive to the needs of customers. Only as a fallback will most users attempt to circumvent the access controls themselves.

Although it might be tempting to describe this class as "works protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence," that would not appear to be a legitimate class under section 1201 because it would be defined only by reference to the technological measures that are applied to the works, and not by reference to any intrinsic qualities of the works themselves. See the discussion of "works" above in section III.A.3. The evidence in this rulemaking of malfunctioning, damaged or obsolete technological protection measures has related to software (dongles) and, in the cases raised by representatives of libraries, to compilations of literary works and databases. Therefore, this class of works is defined primarily in terms of such literary works, and secondarily by reference to the faulty technological protection measures.

Although this exemption fits within the parameters of the term "class of works" as described by Congress, it probably reaches the limits of those parameters. The definition of the class does start with a section 102 category of works—literary works. It then narrows

that definition by reference to attributes of access controls that sometimes protect those works—i.e., the failure of those access controls to function as intended. But in reality, this exemption addresses a problem that could be experienced by users in accessing all classes of copyrighted works. This subject matter is probably more suitable for a legislative exemption, and the Register recommends that Congress consider amending section 1201 to provide a statutory exemption for all works, regardless of what class of work is involved, that are protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence. Meanwhile, because genuine harm has been demonstrated in this rulemaking proceeding and because it is possible to define a class of works that fits within the framework of section 1201(a)(1)(B), (C) and (D), the Register recommends that the Librarian exempt this class of works during the first three years in which section 1201(a)(1) is in effect. But the fact that sufficient harm has been found to justify this exemption for this three-year period will not automatically justify a similar exemption in the next triennial rulemaking. In fact, if there was a showing in the next rulemaking proceeding that faulty access controls create adverse impacts on noninfringing uses of all categories of works, such a showing could, paradoxically, result in the conclusion that the problem is not one that can be resolved pursuant to section 1201(a)(1)(C) and (D), which anticipates exemptions only for "a particular class of works." A legislative resolution of this problem is preferable to a repetition of the somewhat ill-fitting regulatory approach adopted herein.

The class of works covers literary works—and is applicable in particular to computer programs, databases and other compilations—protected by access controls that fail to permit access because of damage, malfunction or obsolescence. The terms "damage" and "malfunction" are fairly self-explanatory, and would apply to any situation in which the access control mechanism does not function in the way in which it was intended to function. For definition of the term "obsolete," it is instructive to look to section 108(c), which also addresses the issue of obsolescence. For the purposes of section 108, "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." In the context of this

rulemaking, an access control should be considered obsolete in analogous circumstances.

An exemption for this class, however, would not cover several other types of problems that commenters presented. For example, a commenter describing the problems experienced by users of damaged or malfunctioning dongles noted that similar problems occur when dongles become lost or are stolen. C199. That is, vendors of the software are often reluctant to replace the dongle, or insist that the user purchase a new dongle at a high cost. While this may be a problem, exempting works in this situation could unfairly prejudice the interests of copyright owners, who have no way of ascertaining whether the dongle was in fact lost or stolen, or whether it has been passed on to another user along with an unauthorized copy of the software, while the original user obtains a replacement by claiming the original dongle was lost. This exemption also would not cover situations such as those described by certain libraries, who expressed the fear that they would be prevented by 1201(a)(1) from reformatting materials that are in obsolete formats. If the materials did not contain access control protections, but were merely in an obsolete format, 1201(a)(1) would not be implicated. To the extent that technological protections prevented the library from converting the format, those protections would seem to be copy controls, the act of circumvention of which is not prohibited by section 1201.

The factors listed in 1201(a)(1)(C) support the creation of this exemption. In cases such as those described above, access controls actually decrease the availability of works for any use, since works that were intended to be available become unavailable due to damage, malfunction or obsolescence. This decrease in availability is felt particularly by the library and educational communities, who have been prevented from making non-infringing uses, including archiving and preservation, by malfunctioning or obsolete access controls. Circumvention of access controls in these instances should not have a significant effect on the market for or value of the works, since copyright owners typically will already have been compensated for the use of the work.

#### *E. Other Exemptions Considered, But Not Recommended*

A number of other proposed exemptions were considered, but for the reasons set forth below the Register does

not recommend that any of them be adopted.

#### 1. "Thin Copyright" Works

Many commenters have urged the exemption of a class of works consisting of what they term "thin copyright works." These are works consisting primarily (but not entirely) of matter unprotected by copyright, such as U.S. government works or works whose term of copyright protection has expired, or works for which copyright protection is "thin," such as factual works. As one proponent, the Association of American Universities, described the class, it includes "works such as scholarly journals, databases, maps, and newspapers [which] are primarily valuable for the information they contain, information that is not protected by copyright under Section 102(b) of the Copyright Act." C161. Most often this argument is made in the context of databases that contain a significant amount of uncopyrightable material. These databases may nonetheless be covered by copyright protection by virtue of the selection, coordination and arrangement of the materials. They may also incorporate copyrightable works or elements, such as a search engine, headnotes, explanatory texts or other contributions that represent original, creative authorship. While this proposal is frequently made with reference to databases, it is not limited to them, and would apply to any works that contain a mixture of copyrightable and uncopyrightable elements.

Proponents of such an exemption make two related arguments. First, some commenters argue that using Section 1201(a)(1) to prohibit circumvention of access controls on works that are primarily factual, or in the public domain, bootstraps protection for material that otherwise would be outside the scope of protection. It would, in effect, create legal protection for even the uncopyrightable elements of the database, and go beyond the scope of what Section 1201(a)(1) was meant to cover. An exemption for these kinds of works, proponents argue, is necessary to preserve an essential element of the copyright balance "that copyright does not protect facts, U.S. government works, or other works in the public domain. Without such an exemption, users will be legally prevented from circumventing access controls to, and subsequently making noninfringing uses of, material unprotected by copyright.

A related worry of commenters is that, in practice, section 1201(a)(1) will be used to "lock up" works unprotected by

copyright. They predict that compilers of factual databases will have an incentive to impose a thin veneer of copyright on a database, by adding, for example, some graphics or an introduction, and thus take unfair advantage of the protection afforded by Section 1201. In addition, they fear that access to works such as databases, encyclopedias, and statistical reports, which are a mainstay of the educational and library communities, will become increasingly and prohibitively expensive.

On the record developed in this proceeding, the need for such an exemption has not been demonstrated. First, although proponents argue that 1201(a)(1)(A) bootstraps protection for uncopyrightable elements in copyrightable databases, the copyrightable elements in databases and compilations usually create significant added value. Indeed, in most cases the uncopyrightable material is available elsewhere in "raw" form, but it is the inclusion of that material in a copyrightable database that renders it easier to use. Search engines, headnotes, selection, and arrangement, far from being a thin addition to the database, are often precisely the elements that database users utilize, and which make the database the preferred means to access and use the uncopyrightable material it contains. Because it is the utility of those added features that most users wish to access, it is appropriate to protect them under Section 1201(a)(1)(A). Moreover, all copyrightable works are likely to contain some uncopyrightable elements, factual or otherwise. This does not undermine their protection under copyright or under 1201(a)(1)(A).<sup>8</sup>

Second, the fear that 1201(a)(1)(A) will disadvantage users by "locking up" uncopyrightable material, while understandable, does not seem to be borne out in the record of this proceeding. Commenters have not provided evidence that uncopyrightable material is becoming more expensive or difficult to access since the enactment of Section 1201, nor have they shown that works of minimal copyright authorship

<sup>8</sup> One commenter suggested an exemption for "compilations and other works that incorporate works in the public domain, unless the compilation or work was marked in such a way as to allow identification of public domain elements and separate circumvention of the technological measures that controlled access to those elements." PH4 (Ginsburg). While this approach could address some of the concerns raised by proponents, it is unclear whether it would be technologically feasible for copyright owners to implement. Furthermore, as discussed below, the Register has not yet been presented with evidence that there have been or are likely to be adverse impacts in this area.

are being attached to otherwise unprotectible material to take advantage of the 1201 prohibitions. The examples presented in this rulemaking proceeding of databases that mix copyrightable and uncopyrightable elements seem to be operating in a way that minimizes the impact on noninfringing uses, such as the LEXIS/NEXIS database and databases produced by a witness in the Washington DC hearings, SilverPlatter Information Inc. These databases provide business models that allow users to pay for different levels of access, and to choose different payment schedules depending on the way they would like to use the database. Finally, although the fear that material will be "locked up" is most compelling with respect to works that are the "sole source" of uncopyrightable material, most of the uncopyrightable material in these databases can be found elsewhere, albeit not with the access and use-enhancing features provided by the copyrightable contributions. Where users can reasonably find these materials in other places, their fears that it will be "locked up" are unwarranted.

In applying the four factors in Section (a)(1)(C), the impact of access control technologies on the availability of works in general, and their impact on the library and educational communities in particular, must be evaluated. In general, it appears that the advent of access control protections has increased the availability of databases and compilations. Access controls provide an increased incentive for database producers to create and maintain databases. Often, the most valuable commodity of a database producer is access to the database itself. If a database producer could not control access, it would be difficult to profit from exploitation of the database. Fewer databases would be created, resulting in diminished availability for use. If there were evidence that technological access protections made access to these works prohibitively expensive or burdensome, it would weigh against increased availability. However, as discussed above, such evidence has not been presented in this proceeding. Nor has there been a showing of any significant adverse impact thus far on nonprofit archival, preservation and educational activities or on criticism, comment, news reporting, teaching, scholarship or research. There is no evidence that the use of technological measures that control access to "thin copyright" works has made those works less accessible for such purposes than they were prior to the introduction of such measures. Finally, in assessing the effect of

circumvention on the market for or value of the works, it appears likely that if circumvention were permitted, the ability of database producers to protect their investment would be seriously undermined and the market would be harmed.

## 2. Sole Source Works

A number of commenters proposed an exemption for a class of "sole source works," that is, works that are available from a single source, which makes the works available only in a form protected by access controls.<sup>9</sup> C162 (American Library Association et al.); C213; C234. Proponents fear that works will increasingly become available only in digital form, which will be subject to access controls that prohibit users who want to make noninfringing uses from accessing the work, either because access will be too costly or will be refused. In such cases, where there is no other way to get access to the work, all noninfringing uses of the work will be adversely impacted.

Again, it is questionable whether proponents of an exemption have identified a genuine "class" of works. The only thing the works in this proposed class have in common is that each is available from a single source. Moreover, the case has not been made for an exemption for this proposed class.

Commenters submitted different examples of works that were available only in digital form. These included a number of databases and indexes. C162 (ALA). In addition, several commenters noted that digital versions of works, such as motion pictures in DVD format, often contain material, such as interviews, film clips or search engines, not found in the analog versions of the same works. C162, C234.<sup>10</sup>

The concerns of proponents of this type of exemption are understandable. However, there has been no evidence submitted in this rulemaking that access to works available only in a secured format is being denied or has become prohibitively difficult. Even considering the examples presented by various commenters, they merely establish that there are works that exist only in digital form. They have not established that access controls on those works have adversely impacted their ability to make noninfringing uses, or, indeed, that access controls impede their use of

<sup>9</sup> This subject has been discussed briefly above, in reference to databases that contain uncopyrightable material not available elsewhere. This section, however, refers mainly to copyrightable sole source works.

<sup>10</sup> The DVD issue is addressed below, Section III.E.3.

those works at all. In the case of databases and indexes, the Register heard no evidence that licenses to those works were not available or were available only on unreasonable and burdensome terms. For example, in the case of motion pictures on DVDs, anyone with the proper equipment can access (view) the work. If there were evidence that technological access controls were being used to lock up material in such a way that there was effectively no means for a user wanting to make a noninfringing use to get access, it could have a substantial adverse impact on users.<sup>11</sup> No such evidence has been presented in this proceeding. If such evidence is presented in a subsequent proceeding, the case for an exemption may be made.

With respect to this proposed class, little evidence has been presented relating to any of the factors set forth in Section 1201(a)(1)(C). However, a review of those factors confirms that no exemption is justified in this case. If, as the proponents of this exemption assert, there are works that are available only in digital form and only with access control protections, many if not most of those works presumably would not have been made available at all if access control measures had not been available. Indeed, it appears that many of the "sole source" works identified by the American Library Association are works that most likely did not exist in the predigital era. See C162, p. 24. As with "thin copyright" works, no showing has been made of an adverse impact on the purposes set forth in 1201(a)(1)(C)(ii) and (iii).

## 3. Audiovisual Works on Digital Versatile Discs (DVDs)

More comments and testimony were submitted on the subject of motion pictures on digital versatile discs (DVDs) and the technological measures employed on DVDs, primarily Content Scrambling System ("CSS"), than on any other subject in this rulemaking. DVDs are digital media, similar to compact discs but with greater capacity, on which motion pictures and other audiovisual and other works may be stored. DVDs have recently become a

<sup>11</sup> Nonetheless, that evidence would have to be balanced against an author's right to grant access to a work. By definition, any unpublished creative work is almost certain to be available only from a single source—the author. Historically, there has never been a right to access an unpublished work, and the law has guarded an author's right to control first publication. Even when material has already been published, there is no absolute right of access. Even with nondigital formats, one must either purchase a copy of the work or go to someone who has purchased a copy (e.g., a library) in order to obtain access to it.

major medium, although not yet the predominant medium, for the distribution of motion pictures in the "home video" market. CSS is an encryption system used on most commercially distributed DVDs of motion pictures. DVDs with CSS may be viewed only on equipment licensed by the DVD Copy Control Association (DVD CCA). PH25. The terms of the DVD CCA license permits licensed devices to decrypt and play—but not to copy—the films. For a more complete discussion of DVDs and CSS, see *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (S.D.N.Y. 2000), 55 U.S.P.Q.2d 1873 (S.D.N.Y. 2000).

Proponents of an exemption for motion pictures on DVDs raised four general arguments. First, they asserted that CSS represents a merger of access and use controls,<sup>12</sup> such that one of those two control functions of the technology cannot be circumvented without also circumventing the other. PH11. Since Congress prohibited only the conduct of circumventing access measures and declined to enact a comparable prohibition against circumvention of measures that protect the rights of the copyright owner under § 1201(b), they argued that a merger of controls exceeds the scope of the congressional grant. In this view, the merger of access and use controls would effectively bootstrap the legal prohibition against circumvention of access controls to include copy controls and thereby prevents a user from making otherwise noninfringing uses of lawfully acquired copies, such as excerpting parts of the material on a DVD for a film class, which might be a fair use.

While this is a significant concern, there are a number of considerations to be balanced. From the comments and testimony presented, it is clear that, at present, most works available in DVD format are also available in analog format (VHS tape) as well. R123, T Marks, 5/19/00, p. 301. When distributed in analog formats—formats in which distribution is likely to continue for the foreseeable future—these works are not protected by any technological measures controlling access. WS Sorkin, p. 5. Therefore, any harm caused by the existence of access control measures used in DVDs can be

avoided by obtaining a copy of the work in analog format. See House Manager's Report, at 7 ("in assessing the impact of the prohibition on the ability to make noninfringing uses, the Secretary should take into consideration the availability of works in the particular class in other formats that are not subject to technological protections."),<sup>13</sup>

Thus far, no proponents of this argument for an exemption have come forward with evidence of any substantial or concrete harm. Aside from broad concerns, there have been very few specific problems alleged. The allegations of harm raised were generally hypothetical in nature, involved relatively insignificant uses, or involved circumstances in which the noninfringing nature of the desired use was questionable (e.g., backup copies of the DVD) or unclear. T Robin Gross, 5/19/00, pp. 314–15. This failure to demonstrate actual harm in the years since the implementation of the CSS measures tends to undermine the fears of proponents of an exemption.

Similarly, in all of the comments and testimony on this issue, no explanation has been offered of the technological necessity for circumventing the access controls associated with DVDs in order to circumvent the copy controls. If the copy control aspects of CSS may be circumvented without circumventing its access controls, this is clearly not a violation of Section 1201(a)(1)(A). There was no showing that copy or use controls could not be circumvented without violating Section 1201(a)(1). In contrast, there was specific testimony that an analog output copy control on DVD players, Macrovision, could be circumvented by an individual without circumventing the CSS protection measures and without violating section 1201(a)(1). T Marks, 5/19/00, pp. 345–46. It would appear that circumvention

<sup>13</sup> Perhaps the best case for actual harm in this context was made with respect to matter that is available along with the motion picture in DVD format but not available in videotape format, such as outtakes, interviews with actors and directors, additional language features, etc. See C204, p. 4. However, this ancillary material traditionally has not been available in copies for distribution to the general public, and it appears that it is only with the advent of the DVD format that motion picture producers have been willing or able to include such material along with copies of the motion pictures themselves. Because of this and because motion picture producers are generally unwilling to release their works in DVD format unless they are protected by access control measures, it cannot be said that enforcing section 1201(a)(1) would, in the words of the Commerce Committee, result "in less access, rather than more, to copyrighted materials that are important to education, scholarship, and other socially vital endeavors." See Commerce Comm. Report, at 35. Thus, it appears that the availability of access control measures has resulted in greater availability of these materials.

of the Macrovision control, conduct not prohibited by any of the provisions of section 1201, would enable many of the noninfringing uses alleged to be prevented. If in a subsequent rulemaking proceeding one could show that a particular "copy" or "use" control could not in fact be circumvented on a legitimately acquired copy without also circumventing the access measure, one might meet the required burden on this issue.

The merger of technological measures that protect access and copying does not appear to have been anticipated by Congress.<sup>14</sup> Congress did create a distinction between the conduct of circumvention of access controls and the conduct of circumvention of use controls by prohibiting the former while permitting the latter, but neither the language of section 1201 nor the legislative history addresses the possibility of access controls that also restrict use. It is unclear how a court might address this issue. It would be helpful if Congress were to clarify its intent, since the implementation of merged technological measures arguably would undermine Congress's decision to offer disparate treatment for access controls and use controls in section 1201.

At present, on the current record, it would be imprudent to venture too far on this issue in the absence of congressional guidance. The issue of merged access and use measures may become a significant problem. The Copyright Office intends to monitor this issue during the next three years and hopes to have the benefit of a clearer record and guidance from Congress at the time of the next rulemaking proceeding.

Another argument raised in the comments and testimony regarding DVDs is that users of Linux and other operating systems who own computers with DVD drives and who purchase legitimate copies of audiovisual works on DVDs should be able to view these works. Many Linux users have complained that they are unable to view the works on their computers because a licensed player has not yet been developed for the Linux OS platform. R56, PH11, PH3. While this situation created frustration for legitimate users,

<sup>14</sup> However, CSS was already in development in 1998 when the DMCA was enacted. It cannot be presumed that the drafters of section 1201(a) were unaware of CSS. If CSS does involve a merger of access controls and copy controls, it is conceivable that the drafters of section 1201(a)(1) were aware of that. And it is quite possible that they anticipated that CSS would be a "technological measure that effectively controls access to a work."

<sup>12</sup> In this discussion, the term "use controls" is used as a shorthand term for technological measures that effectively protect rights of copyright owners under title 17 (e.g., copy controls)—the controls that are the subject of the prohibition against certain technologies, products, services, devices and components found in section 1201(b)(1).



the problem requires balancing of other considerations.

The reasonable availability of alternate operating systems (dual bootable) or dedicated players for televisions suggests that the problem is one of preference and inconvenience, and leads to the conclusion that an exemption is not warranted. T Metalitz, 5/19/00, pp. 298-99. Moreover, with the rapidly growing market of Linux users, it is commercially viable to create a player for this particular operating system. T Metalitz, 5/19/00, pp. 297-98. DVD CSS has expressed its willingness to license such players, and in fact has licensed such players. PH25. There is evidence that Linux players are currently being developed (Sigma Designs and Intervideo) and should be available in the near future. It appears likely that the market place will soon resolve this particular concern. PH123 (MPAA).

While it does not appear that Congress anticipated that persons who legitimately acquired copies of works should be denied the ability to access these works, there is no unqualified right to access works on any particular machine or device of the user's choosing. There are also commercially available options for owners of DVD ROM drives and legitimate DVD discs. Given the market alternatives, an exemption to benefit individuals who wish to play their DVDs on computers using the Linux operating system does not appear to be warranted.

It appears from the comments and testimony presented in this proceeding that the motion picture industry relied on CSS in order to make motion pictures available in digital format. R123. An exemption for motion pictures on DVDs would lead to a decreased incentive to distribute these works on this very popular new medium. It appears that technological measures on DVDs have increased the availability of audiovisual works to the general public, even though some portions of the public have been inconvenienced.

A third argument raised relating to DVDs was the asserted need to reverse engineer DVDs in order to allow them to be interoperable with other devices or operating systems. C10, C18, C221. While there has been limited judicial recognition of a right to reverse engineer for purposes of interoperability of computer programs in the video game industry, see *Sega Enterprises, Inc. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); *Sony Computer Entertainment, Inc. v. Connectix*, 203 F.3d 596 (9th Cir. 2000), this rulemaking proceeding is not an appropriate forum in which to extend the recognition of such a right

beyond the scope recognized thus far by the courts or by Congress in section 1201(f). In section 1201 itself, Congress addressed the issue of reverse engineering with respect to computer programs that are reverse engineered for the purpose of interoperability under certain circumstances to the "extent any such acts of identification and analysis do not constitute infringement under this title." One court has rejected the applicability of section 1201(f) to reverse engineering of DVDs. *Universal City Studios, Inc. v. Reimerdes*, 82 F.Supp.2d 211, 217-18 (S.D.N.Y. 2000); see also *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp.2d 294 (S.D.N.Y. 2000), 55 U.S.P.Q.2d 1873 (S.D.N.Y. 2000). That decision is on appeal. If subsequent developments in that case or future cases lead to judicial recognition that section 1201(f) does apply to a case such as this, then presumably there would be no need to fashion an exemption pursuant to section 1201(a)(1)(C). If, as the *Reimerdes* court has held, section 1201(f) does not apply in such a situation, an agency fashioning exemptions pursuant to section 1201(a)(1)(C) should proceed with caution before creating an exemption to accommodate reverse engineering that goes beyond the scope of a related exemption enacted by Congress expressly for the purpose of reverse engineering in another subsection of the same section of the DMCA. In any event, a more compelling case must be made before an exemption for reverse engineering of DVDs could be justified pursuant to section 1201(a)(1)(C).

The final argument in support of an exemption for audiovisual works on DVDs was based on the motion picture industry's use of region coding as an access control measure. Proponents of an exemption argued that region coding prevents legitimate users from playing foreign films on DVDs which were purchased abroad on their machines that are encoded to play only DVDs with region coding for the region that includes the United States. C133, C231, C234, R92, PH11. There was also some showing that foreign releases of American and foreign motion pictures may contain content that is not available on the American releases and that circumvention may be necessary in order to access this material. T Gross, 5/19/00, p. 314.

While the use of region coding may restrict unqualified access to all movies, the comments and testimony presented on this issue did not demonstrate that this restriction rises to the level of a substantial adverse effect. The problem appears to be confined to a relatively

small number of users. The region coding also seems to result in inconvenience rather than actual or likely harm, because there are numerous options available to individuals seeking access to this foreign content (PAL converters to view foreign videotapes, limited reset of region code option on DVD players, or purchase of players set to different codes). Since the region coding of audiovisual works on DVDs serves legitimate purposes as an access control,<sup>15</sup> and since this coding encourages the distribution and availability of digital audiovisual works, on balance, the benefit to the public exceeds the *de minimis* harm alleged at this time. If, at some time in the future, material is available only in digital format protected by region codes and the availability of alternative players is restricted, a more compelling case for an exemption might be made.

Consideration of the factors enumerated in subsection 1201(a)(1)(C) supports the conclusion that no exemption is warranted for this proposed class. The release of audiovisual works on DVDs was predicated on the ability to limit piracy through the use of technological access control measures. R123. These works are widely available in digital format and are also readily available in analog format. R123 and WS Sorkin, p. 5. The digital release of motion pictures has benefitted the public by providing better quality and enhanced features on DVDs. While Linux users represent a significant and growing segment of the population and while these users have experienced inconveniences, the market is likely to remedy this problem soon. PH25. See the discussion of the Linux players being developed by Sigma Designs and Intervideo, above. Moreover, there are commercially reasonable alternatives available to these users: R123. The restrictions on DVDs are presently offset by the overall benefit to the public resulting from digital release of audiovisual works. Therefore, at present the existence of technological measures that control access to motion pictures on DVDs has not had a significant adverse impact on the availability of those works to the public at large.

On the question of the availability for use of works for nonprofit archival, preservation, and educational purposes, there was minimal evidence presented that these uses have been or are likely to be adversely affected during the

<sup>15</sup> Among other purposes, it prevents the marketing of DVDs of a motion picture in a region of the world where the motion picture has not yet been released in theatres, or is still being exhibited in theatres. See PH12, pp. 3-4.

ensuing three year period. As stated above, facts relating to the issue of the existence of merged access and use controls may be presented in the next triennial rulemaking proceeding to determine whether the prohibition on circumvention of access controls is being employed in such a manner that it also restricts noninfringing uses.

The impact that the prohibition on the circumvention of technological measures applied to copyrighted works has had or is likely to have on criticism, comment news reporting, teaching, scholarship, or research is uncertain. At present, the concerns expressed were speculative and the examples of the prohibition's likely adverse effects were minimal. At this time it appears likely that these concerns will be tempered by the market. If the market does not effectively resolve problems and sufficient evidence of substantial adverse effects are presented in the next triennial rulemaking proceeding, the Register will re-assess the need for an exemption.

At this time it appears clear from the evidence that the circumvention of technological protection measures would be likely to have an adverse effect on the availability of digital works on DVDs to the public. The music industry's reluctance to distribute works on DVDs as a consequence of circumvention of CSS is a specific example of the potential effect on availability: "In fact, it was the very hack of CSS that caused a delay in introduction of DVD audio into the marketplace." T Sherman, 5/3/2000, p. 18. Since the circumvention of technological access control measures will delay the availability of "use-facilitating" digital formats that will benefit the public and that are proving to be popular with the public, the promulgation of an exemption must be carefully considered after a balancing of all the foregoing considerations. At present, the evidence weighs against an exemption for audiovisual works on DVDs.

#### 4. Video Games in Formats Playable Only on Dedicated Platforms

A number of comments and one witness at the hearings sought an exemption for video games that are playable only on proprietary players. T Hangartner, 5/17/00, p. 247, R73, R109. The arguments in support of an exemption for video games included three issues: reverse engineering of the games for interoperability to other platforms, merger of access and use controls, and region coding of the games.

The existence of video games playable on dedicated platforms is not a new phenomenon in the marketplace. The Computer Software Rental Amendments Act of 1990 expressly provides for different treatment of video games sold only for use with proprietary platforms and those licensed for use on a computer capable of reproduction, recognizing the lower risk that the former will be copied to the detriment of the copyright owner. 17 U.S.C. 109(b)(1)(B)(ii). In the few comments addressing the need for interoperability of video games, there was very little evidentiary support for this alleged need. In fact, the testimony on behalf of Bleem, Inc. demonstrated that in cases involving interoperability of video games, courts have held either that section 1201 is inapplicable or that the exemption in 1201(f) shields this activity for purposes of discovering functional elements necessary for interoperability. T Hangartner, 5/19/00, p. 250; T Russell, 5/19/00, p. 332. Since the Basic Input Output System (BIOS) in these dedicated platforms is a computer program, section 1201(f) would appear to address the problem. To the extent that an identifiable problem exists that is outside the scope of section 1201(f), and therefore potentially within the scope of this rulemaking, its existence has not been sufficiently articulated to support the recommendation for an exemption. See also the discussion of reverse engineering below in Section III.E.5.

The claim that the technological measures protecting access to video games also restrict noninfringing uses of the games also has not been supported by any verifiable evidence. For example, while the backup of such a work may be a noninfringing use, no evidence has been presented that access control measures, as distinguished from copy control measures, have caused an inability to make a backup, and the latter is the more likely cause. Nor has there been any showing that any copy or use control has been merged with an access control, such that the former cannot be circumvented without the latter.

The paucity of evidence supporting an exemption on the basis of region coding similarly precludes a recommendation for an exemption. The few comments that mentioned this issue do not rise to the level of substantial adverse affect that would warrant an exemption for video games.

The factors set forth in section 1201(a)(1)(C) do not support an exemption. There is no reason to believe that there has been any reduction in the availability of video games for use

despite the fact that video games have incorporated access controls and dedicated platforms for many years. To the extent there has been a need for interoperability, it appears that section 1201(f) will allow functional features to be determined as the courts have allowed in the past. There has been insufficient evidence presented to indicate that video games have or will become less available after § 1201(a)(1) goes into effect. There was no evidence offered that the prohibition on circumvention will adversely effect nonprofit archival, preservation, or educational uses of these works. There was also no evidence presented that the prohibition would have an adverse effect on criticism, comment, news reporting, teaching, scholarship, or research. On the other hand, there was little evidence that circumvention would have a negative impact on the market for or value of these copyrighted works, but this is of little consequence given the *de minimis* showing of any adverse impact access control measures have had on availability of the works for noninfringing uses.

#### 5. Computer Programs and Other Digital Works for Purposes of Reverse Engineering

A number of commenters asserted that reverse engineering is a noninfringing use that should be exempted for all classes of digital works. C143, R82. As already noted, reverse engineering was also raised as a basis for an exemption in relation to audiovisual works on DVDs and video games. C221. The arguments raised in support of a reverse engineering exemption for such works are addressed above. To the extent that reverse engineering is proposed for all classes of digital works, it does not meet the criteria of a class. A "class of works" cannot be defined simply in terms of the purpose for which circumvention is desired. See the discussion above, Section III.A.3.

Moreover, to the extent that commenters seek an exemption to permit reverse engineering of computer programs, the case has not been made even if it is permissible to designate a class of "computer programs for the purpose of reverse engineering." When it enacted section 1201, Congress carved out a specific exemption for reverse engineering of computer programs, section 1201(f). That exemption permits circumvention of an access control measure in order to engage in reverse engineering of a computer program with the purpose of achieving interoperability of an independently created computer program with other



programs, under certain circumstances set forth in the statute. When Congress has specifically addressed the issue by creating a statutory exemption for reverse engineering in the same legislation that established this rulemaking process, the Librarian should proceed cautiously before, in effect, expanding the section 1201(f) statutory exemption by creating a broader exemption pursuant to section 1201(a)(1)(C).

The proponents of an exemption for reverse engineering have expressed their dissatisfaction with the limited circumstances under which section 1201(f) permits reverse engineering (C13, C30), but the case they have made is for the legislator rather than for the Librarian. If, in the next three years, there is evidence that access control measures are actually impeding noninfringing uses of works that should be permitted, that evidence can be presented in the next triennial rulemaking proceeding. Such evidence was not presented in the current proceeding.

To the extent that commenters have sought an exemption to permit reverse engineering for purposes of making digitally formatted works other than computer programs interoperable (*i.e.*, accessible on a device other than the device selected by the copyright owner), it seems likely that the work will incorporate a computer program or reside on a medium along with a computer program and that it will be the computer program that must be reverse engineered in order to make the work interoperable. In such cases, section 1201(f) would appear to resolve the issue. To the extent that reverse engineering of something other than a computer program may be necessary, proponents of a reverse engineering exemption would be asking the Librarian to do what no court has ever done: to find that reverse engineering of something other than a computer program constitutes fair use or some other noninfringing use. It is conceivable that the courts may address that issue one day, but it is not appropriate to address that issue of first impression in this rulemaking proceeding without the benefit of judicial or statutory guidance.

The factors set forth in section 1201(a)(1)(C) have already been discussed in the context of audiovisual works on DVDs and video games, the two specific classes of works for which a reverse-engineering exemption has been sought. Those factors do not support an exemption for reverse engineering.

#### 6. Encryption Research Purposes

A number of commenters urged that a broader encryption research exemption is needed than is contained in section 1201(g). *See, e.g.*, C185, C30, R55, R70. Dissatisfaction was expressed with the restrictiveness of the requirement to attempt to secure the copyright owner's permission before circumventing. C153. *See* 17 U.S.C. 1201(g)(2)(C). Most of the references to statutory deficiencies regarding encryption research, however, merely state that the provisions are too narrow. *See, e.g.*, PH20.

As with reverse engineering, proponents of an exemption for encryption research are asking the Librarian to give them a broader exemption than Congress was willing to enact. But they have not carried their burden of demonstrating that the limitations of section 1201(g) have prevented them or are likely in the next three years to prevent them from engaging in noninfringing uses. With respect to encryption research, the DMCA required the Copyright Office and the National Telecommunications and Information Administration of the Department of Commerce to submit a joint report to Congress on the effect the exemption in section 1201(g) has had on encryption research and the development of encryption technology, the adequacy and effectiveness of technological measures designed to protect copyrighted works; and protection of copyright owners against the unauthorized access to their encrypted copyrighted works. The Copyright Office and NTIA submitted that report in May, 2000. Report to Congress: Joint Study of Section 1201(g) of The Digital Millennium Copyright Act (posted at [http://www.loc.gov/copyright/reports/studies/dmca\\_report.html](http://www.loc.gov/copyright/reports/studies/dmca_report.html) and <http://www.ntia.doc.gov/reports/dmca>). In that report, NTIA and the Copyright Office concluded that "[o]f the 13 comments received in response to the Copyright Office's and NTIA's solicitation, not one identified a current, discernable impact on encryption research and the development of encryption technology; the adequacy and effectiveness of technological protection for copyrighted works; or protection of copyright owners against the unauthorized access to their encrypted copyrighted works, engendered by Section 1201(g)." That conclusion is equally applicable to the comments on encryption research submitted in this proceeding.

Moreover, an exemption for encryption research is not focused on a

class of works. *See* discussion above, Section III.A.3.

#### 7. "Fair Use" Works

A large number of commenters urged the Register to recommend an exemption to circumvent access control measures for fair use purposes. Responding to the statutory requirement of designating a "particular class of works," the Higher Education Associations (the Association of American Universities, the National Association of State Universities and Land Grant Colleges, and the American Council on Education) put forth within a broad class of "fair use works" the specific classes that are most likely to be used by libraries and educational institutions for purposes of fair use. PH24. The classes are scientific and social databases, textbooks, scholarly journals, academic monographs and treatises, law reports and educational audio/visual works. A witness testifying on behalf of the Higher Education Associations explained that these works should be exempted where the purpose of using the works is fair use. T Gasaway, 5/18/00, p. 74. The Higher Education Associations also suggested that the exemption could be further limited to specific classes of persons who were likely to be fair users. PH24, at 12.

To the extent that proponents of such an exemption seek to limit its applicability to certain classes of users or uses, or to certain purposes, such limitations are beyond the scope of this rulemaking. It is the Librarian's task to determine whether to exempt any "particular class of works." 17 U.S.C. 1201(a)(1)(B), (C) (emphasis added). *See* the discussion above, Section III.A.3.

The merits of an exemption for scientific and social databases have already been discussed to some extent in the treatment of "thin copyright" works and sole source works. To the extent that these works are not in these previously addressed classes, even though scientific and social databases can be seen to present an appropriate class, the case for an exemption has not been presented. No evidence was submitted that specific works in these named classes have been or are likely to be inaccessible because educational institutions or libraries have been prevented from circumventing them. Although the proponents of this exemption allege that if they are prevented from circumventing these particular classes of works, they and those they represent will not be able to exercise fair use as to this class of works, they have not demonstrated that

they have been unable to engage in such uses because of access control measures.

Many of the concerns raised by proponents of such an exemption are actually related to copy control measures rather than access control measures. See, e.g., R75 (National Library of Medicine). If a library or higher education institution has access to a work, section 1201 does not prevent the conduct of circumventing technological measures that prevent the copying of the work.

Although textbooks, scholarly journals; academic monographs and treatises, law reports and educational audiovisual works have been mentioned as candidates for this proposed class of "fair use" works, proponents have failed to demonstrate how technological measures that control access to such works are preventing noninfringing uses or will in the next three years prevent such uses. In fact, it is not even clear whether technological measures that control access are actually used with respect to some of these types of works, e.g., textbooks. While it is easy to agree that if access control measures were creating serious difficulties in making lawful uses of these works, an exemption would be justified, the case has not been made that this is a problem or is about to be a problem.

Application of the factors set forth in section 1201(a)(1)(C) to this proposed class of works is identical to the analysis of those factors with respect to "thin copyright" works discussed above (Section III.E.1) and will not be repeated here.

#### 8. Material that Cannot be Archived or Preserved

A number of library associations expressed concern about the general impact of the prohibition against circumvention on the future of archiving and preservation. See, e.g., C175, R75, R80, C162, p. 26-29, 31-32; R83, p. 2-4; PH18, p. 5. To some extent, these concerns may be addressed in the second of the two recommended exemptions, to the degree that faulty or obsolete access control measures may be preventing libraries and others from gaining authorized access to works in order to archive them. But more generally, libraries expressed concerns that digital works for which there are no established non-digital alternatives may not be archived. C162, p. 26-29.

Because materials that libraries and others desire to archive or preserve cut across all classes of works, these works do not constitute a particular class.<sup>16</sup>

<sup>16</sup> The National Digital Library and the Motion Picture Broadcasting and Recorded Sound Division

See the discussion above, Section III.A.3. The Office is limited to recommending only particular classes, and then only when it has been established that actual harm has occurred, or that harm will likely occur. Such a showing of adverse effect on all materials that may need to be archived or preserved has not been made. Demonstration of the inability to archive or preserve materials tied to a more particular class of works would be needed to establish an adverse effect in this rulemaking. Application of the relevant factors cannot take place in gross; without reference to a specified class of works.

Even if such materials were to constitute a particular class, and harm were shown, adverse causes other than circumvention must be discounted in balancing the relevant factors. House Manager's Report, at 6. The libraries and Higher Education Associations provided examples of problems due to numerous other factors—licensing restrictions, cost, lack of technological storage space, and uncertainty whether publishers will preserve their own materials. These are adverse effects caused by something other than the prohibition on circumvention of access control measures.

The Higher Education Associations cite the frequent phenomenon of "disappearing" works—those appearing online or on disk today that may be gone tomorrow, e.g., because they may be removed from an online database or because the library or institution has access to them only during the term of its license to use the work. See T Gasaway, 5/18/00, p. 38. This rulemaking proceeding cannot force copyright owners to archive their own works. Moreover, assuming that libraries and other institutions are unable to engage in such archiving themselves today, they have not explained how technological measures that control access to those works are preventing them from doing so. Rather, it would appear that restrictions on copying are more likely to be responsible for the problem. See R75 (National Library of Medicine's inability to preserve Online Journal of Current Clinical Trials and videotapes, apparently because of restrictions on copying); C162, pp. 25-29 (American Library Association *et al.*). Section 1201

of the Library of Congress addressed the class of audiovisual works when it stated that, to carry out their mission, they may need to circumvent access controls to preserve these materials for the long term. However, they did not state that they have thus far had such a need or that they are aware of circumstances likely to require them to engage in such circumvention in the next three years.

does not prohibit libraries and archives from the conduct of circumventing copy controls. Therefore, it is difficult to understand how an exemption from the prohibition on circumvention of access controls would resolve this problem.

Some commenters have also complained that licensing terms have required them to return CD-ROMs to vendors in order to obtain updated versions, thereby losing the ability to retain the exchanged CD-ROM as an archival copy. See, e.g., C162, p. 27. But they have failed to explain how technological measures that control access to the works on the CD-ROMs play any role in their inability to archive something that they have returned to the vendor.<sup>17</sup> In a future rulemaking proceeding, libraries and archives may be able to identify particular classes of works that they are unable to archive or preserve because of access control measures, and thereby establish the requisite harm.

Because this proposed exemption does not really address a particular class of works, application of the factors set forth in section 1201(a)(1)(C) is difficult. If particular classes of works were in danger of disappearing due to access control measures, then presumably all of the factors (with the possible exception of the factor relating to the effect of circumvention on the market for or value of the copyrighted works) would favor such an exemption. But the current record does not support an exemption.

#### 9. Works Embodied in Copies Which Have Been Lawfully Acquired by Users Who Subsequently Seek to Make Non-infringing Uses Thereof

An exemption for "works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof" was put forward by Peter Jaszi, a witness representing the Digital Future Coalition, and was subsequently endorsed by many members of the academic and library communities. T Peter Jaszi, 5/3/00; T Julie Cohen, 5/4/00, PH22, T Diana Vogelsong, 5/3/00. In addition, it was endorsed by the comments of the Assistant Secretary of Commerce for Communications and Information. See discussion above, Section III.B. Similar exemptions were independently proposed by other commenters. PH24 (AAU); PH18 (ALA), PH21. These proposed exemptions focus on allowing circumvention by users for

<sup>17</sup> A related issue, CD-ROMs with faulty access controls that erroneously exclude authorized users from access, is addressed in the second exemption recommended by the Register.

noninfringing purposes after they have gained initial lawful access, although the Association of American Universities' proposal would limit the ability to circumvent after the period of lawful access to users possessing a physical copy of the work.

The proponents for this exemption (using what are sometimes called "persistent access controls") will be used to lock up works, forcing payment for each time the work is accessed. In addition, they fear that persistent access controls will be used to constrain the ability of users, subsequent to initial access, to make uses that would otherwise be permissible, including fair uses. Without this exemption, they assert, the traditional balance of copyright would be upset, tipping it drastically in favor of the copyright owners and making it more difficult and/or expensive for users to engage in uses that are permitted today.

Therefore, these commenters propose an exemption for a class of "works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof." In substance, the proposal would exempt all users who wish to make noninfringing uses, regardless of the type of work, provided that they either lawfully acquire a copy or, in some versions of the proposal, lawfully acquire access privileges. This exemption, commenters argue, will equitably maintain the copyright balance. It would allow copyright owners to control the distribution of, and initial authorization of access to, copies of their works, while allowing users to circumvent those access controls for noninfringing uses after they have lawfully accessed or acquired them.

However, for several reasons, the "class" they propose is not within the scope of this rulemaking. First, none of the proposals adequately define a "class" of the type this rulemaking allows the Librarian to exempt. As discussed above in Section III.A.3, "a particular class of work" must be determined primarily by reference to qualities of the work itself. It cannot be defined by reference to the class of users or uses of the work, as these proposals suggest. Second, although the commenters have persuasively articulated their fears about how these business models will develop and affect their ability to engage in noninfringing uses, they have not made the case that these fears are now being realized, or that they are likely to be realized in the next three years.

The Assistant Secretary for Communications and Information has endorsed this proposed exemption. In support of this proposal, NTIA made only general references to one comment, RC113, and to the testimony of Julie Cohen, Siva Vaidyanathan, Sarah Wiant, James Neal, Frederick Weingarten, and the Consortiums of College and University Media Centers (CCUMC). NTIA did not specifically identify what evidence these witnesses and commenters had provided, apart from noting that they provided "numerous examples regarding the manner in which persistent access controls restrict the flow of information" and testimony about "impediments to archiving and preservation of digital works, teaching, and digital divide concerns." The latter concern is addressed in Section III.E.8.

The one comment cited by NTIA related to medical records that are stored in proprietary formats. RC113. It does not appear from that single comment—the only comment or testimony submitted on the issue—that the problem identified by the commenter related to technological measures that control access to copyrighted works. The commenter raised legitimate concerns about difficulties in converting data from one format to another. One can speculate that in the future, access control measures might be applied to medical data and prevent health care workers from obtaining needed access, but the commenter did not make the case that this is happening or is likely to happen in the next three years.

The testimony cited by NTIA relating to access controls that restrict the flow of information raised many fears and concerns but minimal distinct, verifiable, or measurable impacts. Of course, it is a tautology that any measure that controls access to a work degree restrict the flow of the information in the work. But although many of the witnesses complained about "persistent access controls," they did not present specific examples of any adverse effects causally related to such noninfringing uses that could be adverse effects causally related to such noninfringing uses that could be specifically affected has not been specifically shown to be caused by access controls as opposed to other

<sup>18</sup>In fact, one of those witnesses admitted that "the law has caused little harm yet" and that "my fears are speculative and alarmist." T Vaidyanathan, 5/18/00, p. 11. Another of the witnesses admitted that librarians have not yet experienced the "persistent access controls" feared by proponents of this exemption. T Neal, 5/4/00, p. 42.

technological or licensing measures. There appears to be no support in record for a finding that the cited testimony rises to the level of distinct, verifiable and measurable impacts justifying an exemption at this time.

Finally, the proposed exemption parallels elements of an approach that was considered, and ultimately rejected by Congress during the drafting of the law. The version of the DMCA that was passed by the House of Representatives on August 4, 1998, contained a provision that required a rulemaking proceeding that would determine classes of works for which, *inter alia*, users "who have gained lawful initial access to a copyrighted work" would be adversely affected in their ability to make noninfringing uses. HR 2281 EH, Section 1201(a)(1)(B):

The prohibition contained in subparagraph (A) shall not apply to persons with respect to a copyrighted work which is in a particular class of works and to which such persons have gained initial lawful access, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C)."

See also section 1201(a)(1)(D). Thus, when it first passed the DMCA the House of Representatives appears to have agreed with much of the approach taken by the proponents of this exemption. But the fact that Congress ultimately rejected this approach when it enacted the DMCA and, instead, deleted the provision that had limited the applicability of the exemptions to persons who have gained initial lawful access, is clear indication that the Librarian does not have the power to fashion a class of works based upon such a limitation. Such an exemption is more properly a subject of legislation, rather than of a rulemaking the object of which is to determine what classes of works are to be exempted from the prohibition on circumvention of access controls.

### 10. Exemption for Public Broadcasting Entities

The Public Broadcasting Service, National Public Radio, and the Association of America's Public Television Stations described the public broadcasting entities' need to use sound recordings, published musical works and published pictorial, graphic and sculptural works in accordance with exemptions and statutory licenses under section 114(b) and 118(d) of the Copyright Act. R106. They observe that if copyright owners encrypted these classes of works, they would not be able

to make noninfringing uses of them pursuant to the statute. But their submission addressed potential adverse effects of the prohibition on circumvention, not current or even likely adverse effects. There has been no allegation that public broadcasters have encountered or are about to encounter technological protection measures that prevent them from exercising their rights pursuant to sections 114 and 118.

If public broadcasting entities were able to demonstrate such adverse impact, a strong case might be made for an exemption for sound recordings, published musical works and published pictorial, graphic and sculptural works. In part for that very reason, public broadcasters may not experience serious adverse impacts on their ability to use such works pursuant to the compulsory licenses, because copyright owners will have every incentive to facilitate those permitted uses. Indeed, the public broadcasters stated that they "believe that the developing methods of technological protection will be deployed "to support new ways of disseminating copyrighted materials to users, and to safeguard the availability of "works to the public." *Id.*

In any event, there is no need at present for an exemption to accommodate the needs of public broadcasters.

#### IV. Conclusion

Pursuant to the mandate of 17 U.S.C. 1201 (b) and having considered the evidence in the record, the contentions of the parties, and the statutory objectives, the Register of Copyrights recommends that the Librarian of Congress publish two classes of copyrighted works where the Register has found that noninfringing uses by users of such copyrighted works are, or are likely to be, adversely affected, and the prohibition found in 17 U.S.C. 1201 (a) should not apply to such users with respect to such class of work for the ensuing 3-year period. The classes of work so identified are:

1. Compilations consisting of lists of websites blocked by filtering software applications; and
2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

The Register notes that any exemption of classes of copyrighted works published by the Librarian will be effective only until October 28, 2003. Before that period expires, the Register will initiate a new rulemaking to consider de novo what classes of copyrighted works, if any, should be exempt from § 1201(a)(1)(A) commencing October 28, 2003.

Marybeth Peters,  
Register of Copyrights.

#### Determination of the Librarian of Congress

Having duly considered and accepted the recommendation of the Register of Copyrights concerning what classes of copyrighted works should be exempt from 17 U.S.C. 1201(a)(1)(A), the Librarian of Congress is exercising his authority under 17 U.S.C. 1201(a)(1)(C) and (D) and is publishing as a new rule the two classes of copyrighted works that shall be subject to the exemption found in 17 U.S.C. 1201(a)(1)(B) from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) for the period from October 28, 2000 to October 28, 2003. The classes are:

1. Compilations consisting of lists of websites blocked by filtering software applications; and
2. Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

#### List of Subjects in 37 CFR Part 201

Copyright, Exemptions to prohibition against circumvention.

For the reasons set forth in the preamble, the Library amends 37 CFR part 201 as follows:

#### PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. A new § 201.40 is added to read as follows:

#### § 201.40 Exemption to prohibition against circumvention.

(a) *General.* This section prescribes the classes of copyrighted works for which the Librarian of Congress has determined, pursuant to 17 U.S.C. 1201(a)(1)(C) and (D), that noninfringing uses by persons who are users of such works are, or are likely to be, adversely affected. The prohibition against circumvention of technological measures that control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to such users of the prescribed classes of copyrighted works.

(b) *Classes of copyrighted works.* Pursuant to the authority set forth in 17 U.S.C. 1201(a)(1)(C) and (D), and upon the recommendation of the Register of Copyrights, the Librarian has determined that two classes of copyrighted works shall be subject to the exemption found in 17 U.S.C. 1201(a)(1)(B) from the prohibition against circumvention of technological measures that effectively control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) for the period from October 28, 2000 to October 28, 2003. The exempted classes of works are:

(1) Compilations consisting of lists of websites blocked by filtering software applications; and

(2) Literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence.

Dated: October 23, 2000.

James H. Billington,  
The Librarian of Congress

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BILLING CODE 1410-30-P

worker stance. The result will be a public policy morass.

I hope that we can return to this subject next year and hopefully return integrity to telecommunications policy by cleaning up the problems created by placing auction revenue, above all other values, as our highest public policy goal.

Again, I want to commend Chairman BULEY, Chairman TAUZIN, Mr. DINGELL, and our other colleagues for their work on this measure and urge the House to support it.

Mr. BLILEY. Madam Speaker, I urge the adoption of the bill, and I yield back the balance of my time.

The SPEAKER pro tempore (Mrs. EMERSON). The question is on the motion offered by the gentleman from Virginia (Mr. BLILEY) that the House suspend the rules and pass the bill, H.R. 3888, as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill, as amended, was passed.

A motion to reconsider was laid on the table.

#### DIGITAL MILLENNIUM COPYRIGHT ACT

Mr. COBLE. Madam Speaker, I move to suspend the rules and agree to the conference report on 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, and for other purposes.

(For conference report, see proceedings of the House of Thursday, October 8, 1998, at page H10048.)

The SPEAKER pro tempore. Pursuant to the rule, the gentleman from North Carolina (Mr. COBLE) and the gentlewoman from Texas (Ms. JACKSON-LEE) each will control 20 minutes.

The Chair recognizes the gentleman from North Carolina (Mr. COBLE).

Mr. COBLE. Madam Speaker, I yield 10 minutes of my time to the gentleman from Virginia (Mr. BLILEY) and ask unanimous consent that he be permitted to control that time.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from North Carolina?

There was no objection.

Ms. JACKSON-LEE of Texas. Madam Speaker, I yield 10 minutes of my time to the gentleman from Michigan (Mr. DINGELL) and ask unanimous consent that he be allowed to control that time.

The SPEAKER pro tempore. Is there objection to the request of the gentlewoman from Texas?

There was no objection.

#### GENERAL LEAVE

Mr. COBLE. Madam Speaker, I ask unanimous consent that all Members may have 5 legislative days within which to revise and extend their remarks on the bill under consideration.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from North Carolina?

There was no objection.

Mr. COBLE. Madam Speaker, I yield myself such time as I may consume.

Madam Speaker, I rise in support of H.R. 2281, the Digital Millennium Copyright Act. It is not uncommon on this Hill for many people to take great pride in authorship and oftentimes refer to legislation that comes from our respective committees as "landmark legislation," but I think that all who are familiar with this piece of legislation will agree that this is truly landmark legislation.

H.R. 2281 represents a monumental improvement to our copyright law and will enable the United States to remain the world leader in the protection of intellectual property.

Madam Speaker, we could not have reached this point without the collective efforts of many. I thank the gentleman from Illinois (Mr. HYDE), chairman of the Committee on the Judiciary, for his constant support and guidance. I am also appreciative to the work of the gentleman from Virginia (Mr. GOODLATTE).

I thank the gentleman from Michigan (Mr. CONYERS), ranking member of the Committee on the Judiciary, and the gentleman from Massachusetts (Mr. FRANK), ranking member on the Subcommittee on Courts and Intellectual Property. I also thank the gentleman from California (Mr. BERMAN) who invested much time and effort in developing this legislation.

The valuable contributions of several members from the Committee on Commerce must also be recognized: the gentleman from Virginia (Chairman BLILEY); and the gentleman from Michigan (Mr. DINGELL), ranking member; the gentleman from Louisiana (Mr. TAUZIN), chairman of the Subcommittee on Telecommunications, Trade and Consumer Protection; and the gentleman from Massachusetts (Mr. MARKEY), ranking member; as well as the gentleman from Washington (Mr. WHITE); and the gentleman from Colorado (Mr. DAN SCHAEFER), who were also instrumental in facilitating agreement on portions of the bill.

I finally must thank several senators for their diligence in drafting and moving H.R. 2281: the chairman of the Senate Committee on the Judiciary, Senator Orrin HATCH; ranking member, Senator Patrick LEAHY of Vermont; as well as my friend from South Carolina, Senator Strom THURMOND; all were instrumental in bringing about this important achievement in the copyright law.

H.R. 2281 is the most comprehensive copyright bill since 1976 and adds substantial value to our copyright law. It will implement two treaties which are extremely important to ensure adequate protection for American works in countries around the world in the digital age. It does this by making it unlawful to defeat technological protections used by copyright owners to protect their works, including preventing unlawful access and targeting devices made to circumvent encrypted material.\*\*\*\*.\*\*\*\*. Payroll No.: -Name: -Folios: -Date: -Subformat:

□ 1700

It furthermore makes it unlawful to deliberately alter or delete information provided by a copyright owner which identifies a work, its owner and its permissible uses.

H.R. 2281 furthermore addresses a number of other important copyright issues. It clarifies the circumstances under which on-line and Internet access providers could be liable when infringing material is transmitted on-line through their services. It ensures that independent service organizations do not inadvertently become liable for copyright infringement merely because they have activated a machine in order to service its hardware components. It also creates an efficient statutory licensing system for certain performances and reproductions made by webcasters which will benefit both the users of copyrighted works and the copyright owners.

Unfortunately, in arriving at the final agreement on what would be included in H.R. 2281, title V of the House-passed version, which provided for limited protection of databases, was removed. I am pleased, however, that we were able to bring that issue so far this session. It is important legislation that will benefit many industries and businesses in the United States, and I intend to work diligently next session to pass it.

I appreciate and would be remiss if I did not mention at this time statements by Senator HATCH and Senator LEAHY made on the floor of the other body that they pledge to take up a database protection bill early in the next Congress.

Madam Speaker, 2281 is necessary legislation to ensure the protection of copyrighted works as the world moves into the digital environment. This will ensure that American works will flourish as we move further into the new millennium.

I urge my colleagues to vote "yes" on H.R. 2281.

Madam Speaker, I reserve the balance of my time.

(Ms. JACKSON-LEE of Texas asked and was given permission to revise and extend her remarks.)

Ms. JACKSON-LEE of Texas. Madam Speaker, I yield myself such time as I may consume.

I rise today in strong support of H.R. 2281, the Digital Millennium Copyright Act, the passage of which many Members on both sides of the issue doubted was one of the priorities of the gentleman from Michigan (Mr. CONYERS) and our committee this year in the Committee on the Judiciary. And we are glad that the committee on which I serve as a member and the gentleman from Michigan (Mr. CONYERS) serves as a ranking member has worked hard in a bipartisan fashion to get this legislation to the President's desk.

Madam Speaker, this is very important legislation, primarily because we are part of a supertechnological society, and we have got to all get along.

WIPO implementation and the important explication of liability for those service providers who knowingly transmit infringing material on-line marks a critical achievement for those of us who support strong copyright protections and fairness.

When we started on this journey toward passage today, we pledged to work with the gentleman from Illinois (Mr. HYDE), the gentleman from North Carolina (Mr. COBLE), and I thank them very much for their work, and the gentleman from Massachusetts (Mr. FRANK) to get this done; also the good work of the gentleman from Virginia (Mr. BLILEY) and the gentleman from Michigan (Mr. DINGELL), and the gentleman from Louisiana (Mr. TAUZIN) and the gentleman from Massachusetts (Mr. MARKEY) for their good works and many others. Members said it could not be done. Members said, do it this way, not that way. But we worked together, cooperatively and successfully.

I am very proud of the work that we have done. We are strengthening domestic copyright law and providing leadership globally so that the United States can continue to impress upon other nations the importance of strong copyright protection.

I am disappointed by some changes that we agreed to make to get this bill into law. I wish we could have done more to strengthen the role of the Patent and Trademark Office within its own agency. I would have preferred to see a database protection bill in this legislation, but we were not able to get that now. That means we will have to start again early next year on that bill, and that is something that we will all work on together. I believe it can be done.

I commend the gentleman from Illinois (Mr. HYDE) and the gentleman from North Carolina (Mr. COBLE) and the gentleman from Massachusetts (Mr. FRANK) for their hard work, again, on this bill and for the important role that the gentleman from California (Mr. BERMAN) played on the conference committee.

I commend the important copyright industries, the telecommunications industry, the Nation's libraries and importantly the guilds and unions for working cooperatively with us to inform us of the needs they confront in a digital environment. I am proud of the product we have arrived at, and I am also pleased to support it and urge all of my colleagues to be able to support this very important legislation for this 105th Congress.

Madam Speaker, I reserve the balance of my time.

Mr. BLILEY. Madam Speaker, I yield myself 3 minutes.

Madam Speaker, I rise in support of the conference report on H.R. 2281. I would like to express my admiration and appreciation for the hard work of the chairman of the Committee on the Judiciary, the gentleman from Illinois (Mr. HYDE), and his able subcommittee chairman, the gentleman from North

Carolina (Mr. COBLE), in producing this important legislation. Through their hard work we have been able to reach consensus on historic legislation to implement the WIPO copyright treaties.

I also would like to thank my ranking member, the gentleman from Michigan (Mr. DINGELL), and the gentleman from Wisconsin (Mr. KLUG) and the gentleman from Virginia (Mr. Boucher), who, through their hard work, have substantially improved this legislation. As a result of their steadfast commitment to the principle of fair use, we have produced WIPO implementing legislation of appropriate scope and balance.

Mr. Chairman of the Committee on Commerce, I am pleased to report that the final bill reflects the two most important changes proposed by our committee. First, we have preserved a strong fair use provision for the benefit of libraries, universities and consumers generally. Second, we have ensured that manufacturers of popular telecommunications, computer and consumer electronic products are not subject to a design mandate in producing new products, and that they, retailers, and professional services can make playability adjustments without fear of liability.

Through the able efforts of the gentleman from Louisiana (Mr. TAUZIN) and the gentleman from Massachusetts (Mr. MARKEY), we also have included strong provisions on security systems testing, encryption research, and software interoperability development so that these vital activities will continue. And we have included strong consumer protection provisions. In short, we have produced a bill that should help spur the growth of electronic commerce while protecting the creative work of our Nation's content community.

I urge my colleagues to support the conference report.

Madam Speaker, I reserve the balance of my time.

Mr. DINGELL. Madam Speaker, I yield myself 3 minutes.

Madam Speaker, I commend the distinguished gentleman from Virginia (Mr. BLILEY), the distinguished gentleman from Illinois (Mr. HYDE), the distinguished gentleman from North Carolina (Mr. COBLE), my good friend, the gentleman from Michigan (Mr. CONYERS), ranking member of the subcommittee, and the gentlewoman from Texas (Ms. JACKSON-LEE) for the fine work which they have done on this particular matter.

I rise in strong support of the conference report, which I believe will implement two World Intellectual Property Organization copyright treaties.

The bill was produced through the hard work and the cooperation of two committees, and it is the conference committee that has largely adopted the provisions which were added to the bill by the Committee on Commerce.

We are now considering WIPO implementing legislation that strikes a

proper balance between copyright owners and information consumers. It is very clear to us that we need to have the protection of the fair use provisions which had previously been in the law. This we have done. We have included strong privacy protection for consumers. We have permitted electronic manufacturers to make design adjustments to their products to ensure that consumers will receive the best playback quality without fear of liability. We have also added provisions safeguarding encryption research, security systems testing and computer interoperability. At the same time we gave content owners the tools to discourage the production of illegal black boxes which open the door to piracy. Thus the bill will continue faster innovation without stifling the growth of electronic commerce.

The bill is a good one. I urge my colleagues to support it.

Madam Speaker, I reserve the balance of my time.

Mr. COBLE. Madam Speaker, I yield 2 minutes to the gentleman from California (Mr. DREIER), who has been very helpful and very supportive in this matter.

Mr. DREIER. Madam Speaker, I thank my friend from Greensboro for yielding me this time and for his great leadership, along with that of my friend from Richmond, who has worked long and hard on this, and the gentleman from Thibodaux, Louisiana, and my colleagues on the other side of the aisle who have done a great job on this.

Clearly, as we look at the problems that we face as a Nation, and as we move rapidly towards this global economy, it is difficult to imagine an issue that is much more important than theft of intellectual property. Property rights are an issue which we talk about regularly, and implementation of this WIPO treaty and our support of it is, I believe, going to go a long way towards ensuring that the property of individuals is not in any way jeopardized.

If we look at figures, most recently in 1996, there are estimates that \$7.6 billion in theft of film, books, music and software has taken place, and many of us believe that that figure has actually gotten higher in the past 2 years. It is a problem which obviously continues to be in the forefront and is going to be there unless we have full implementation of this.

We have U.S. industries involved in a wide range of areas, and we are creating new ideas here in the United States and are in the forefront as the world's greatest information exporter and importer. And as such, these new ideas are creating opportunities for people who steal these proposals. So that is why implementation of WIPO is so important.

I want to say that as we look at not only the film and entertainment industries, but the biotech industry and what I believe will be many new industries that are developing in this country in the coming years, WIPO is so important for that. I urge my colleagues



in a bipartisan way to support this measure.

I again congratulate my colleagues who played such a key role in working with us on it.

Mr. CONYERS. Madam Speaker, I yield myself such time as I may consume.

I first wanted to thank my colleague and dean of the House, the gentleman from Michigan (Mr. DINGELL), for sharing this legislative product with us, he and the Committee on Commerce and the subcommittee of the Committee on the Judiciary. I think everyone has heard that we finally reached a conclusion that I think may satisfy nearly every Member in the House of Representatives.

This Digital Millennium Copyright Act, the legislation which was at one time in a doubtful state of passage by many, has now come before the floor. And as the ranking member on the Committee on the Judiciary, I am proud to suggest that this is a bipartisan product, a work that has been thoroughly reviewed by two committees and two subcommittees in this House alone and is certainly worthy of being signed into law by the President.

The WIPO implementation and the important explication of the liability for those service providers who knowingly transmit infringing material online marks a critical achievement for those of us who support strong copyright protection and the fairness that goes with it.

When we started on the journey toward the passage that I think is in front of us, I pledged to work with the gentleman from Illinois (Mr. HYDE), the gentleman from North Carolina (Mr. COBLE), subcommittee chairman, and the ranking member, the gentleman from Massachusetts (Mr. FRANK), to make sure that this was done. Although it was thought not to be possible at the time, I think this work exemplifies the kind of bipartisanship that this Congress has and should continue to have as we move forward in other matters.

□ 1715

We are strengthening domestic copyright law and providing global leadership so that this great Nation can continue to impress upon other nations the importance of strong copyright protection.

Now, not all the provisions have reached a level of perfection. We might have done more to strengthen the role of the Patent and Trademark Office within its own agency. This Member would have preferred to see a database protection bill included in the measure before us. But that was not possible. Which means that we will begin again in the next Congress, all of us who are so honored by our constituents to return. We will have to start all over again in this area, and it is something that I urge my colleagues in both committees to take seriously.

I again commend the chairman of the Committee on Commerce, and the

ranking member, and all of those in the Judiciary that worked on it. The gentleman from California (Mr. HOWARD BERMAN) played an important role in the conference committee. And so, too, of great assistance was the copyright industry, the telecommunications people, the Nation's libraries and librarians, the unions and the guilds who worked cooperatively with us to inform us of the needs that they confront in this digital environment.

I am proud of the product, and like all the speakers before me, I urge its favorable confirmation.

Madam Speaker, I would like to emphasize that it was my decision to share this time with Mr. DINGELL, the Ranking member of the House Commerce Committee. Under the rules, all of the time would have come to the Judiciary Committee, but I am deciding to share the time for two reasons.

The first reason is the respect and fondness that I hold for the dean of the House, Mr. DINGELL. He asked that I share the time, and out of respect for his leadership in the House, I was happy to oblige.

Second the parliamentarian ruled that the House Commerce Committee had some legitimate jurisdictional concerns over discrete aspects of the bill. As such House Commerce Committee members were appointed during the House-Senate conference, albeit in lesser numbers. Mr. DINGELL and his Commerce Committee colleagues played a constructive role in bringing this measure to the floor.

The sharing of the time should in no way imply that the two committees are, in any way, on equal footing from a jurisdictional perspective on this measure, but does recognize both my great fondness for the gentleman from Michigan, Mr. DINGELL and the very constructive role that he played in bringing this matter to the floor.

Madam Speaker, I reserve the balance of my time.

Mr. BLILEY. Madam Speaker, I yield 3 minutes to the gentleman from Louisiana (Mr. TAUZIN), chairman of the Subcommittee on Telecommunications, Trade, and Consumer Protection of the Committee on Commerce.

Mr. TAUZIN. Madam Speaker, I thank the chairman for yielding me this time. We all know, of course, that we have long ago entered the information age, but what we are about to enter is the new information digital age.

This WIPO Treaty Implementation bill is extremely important not just to America and Americans but to citizens of the world. As we enter this information digital age, it becomes increasingly easy for people to make perfect copies of other people's works; their music, their books, their videos, their movies. In short, the WIPO treaty is an attempt worldwide to protect those intellectual properties from thievery, from duplication, from piracy.

How do we protect those works perfectly in a digital world and, at the same time, respect something pretty critical to Americans: The free exchange of ideas and information; the ability of any kid in America to walk into a library and examine free of

charge a work of fiction, a book written by one of the masters, to see a video, or to hear some music over the radio, or to operate a simple device like a VCR at home to see a movie later that was played earlier in the day? How do we protect the fair use of those works of art, those intellectual properties and, at the same time, protect them in a digital age?

This House dramatically improved this bill as it left the Senate. As the Senate had produced the bill, there were no protections for citizens for these fair uses of information in a library, in a bookmobile, with a VCR. As this bill now comes back to the House and Senate from conference, the work of the House Committee on the Judiciary, and the Committee on Commerce, in particular, in making sure that there was a balance between the free exchange of ideas and protecting works in a digital age, were protected in this bill.

The right to do encryption research. The right to be able to webcast music on the internet. All of these issues now have been wrapped into an excellent compromise that I think sets the stage for the rest of the world to follow.

This is a critical day. America provides more information to the world than any other country of the world. Protecting those works in commerce is critical. We set the mark today with a strong implementation bill, but we do it carefully, respecting the right of people to fair use in accessing information in a free society; in making sure that libraries and schools of thought in universities can still do research, and all of us can access information in a society that so prides itself on free speech and the free exchange of information.

To all who have worked on it, the chairman of the full committees, and to all the Members who have put in so many hours, this is a good day, this is a good bill.

Mr. CONYERS. Madam Speaker, might I be informed how much time remains on each side?

The SPEAKER pro tempore (Mrs. EMERSON). The gentleman from Michigan (Mr. CONYERS) has 2½ minutes remaining; the gentleman from Michigan (Mr. DINGELL) has 8½ minutes remaining; the gentleman from North Carolina (Mr. COBLE) has 3 minutes remaining; and the gentleman from Virginia (Mr. BLILEY) has 5 minutes remaining.

Mr. CONYERS. Madam Speaker, I reserve the balance of my time.

Mr. DINGELL. Madam Speaker, I yield back the balance of my time.

Mr. COBLE. Madam Speaker, did I understand that I have 3 minutes remaining, and that I have the right to close?

The SPEAKER pro tempore. That is correct.

Mr. COBLE. Madam Speaker, I yield 2 minutes to the gentleman from Michigan (Mr. KNOLLENBERG), who authored title III of this bill.

Mr. KNOLLENBERG. Madam Speaker, I rise in support of this bill, and I

appreciate working with the gentleman from North Carolina (Mr. COBLE). It seems like it has been months, but with the great effort put on by both sides, we have done, I think, a marvelous job, and I am glad this feature is included in the bill.

This provision I introduced ensures that a computer owner may authorize the activation of their computer by a third party for the limited purpose of servicing computer hardware components. The specific problem is when the computer is activated, the software is copied into the ram, the random access memory. This copy is protected under section 117 of the copyright act, as interpreted by the 4th and 9th Circuit Courts of Appeals. This technical correction is extremely important to independent service organizations, or ISOs as they are known, who, without this legislation, are prohibited from turning on a customer's computer.

A weight of litigation has plagued the computer repair market. The detrimental effect is that ISOs are prevented from reading the diagnostics software and, subsequently, cannot service the computer's hardware.

The financial reality is that the multibillion dollar nationwide ISO industry is at risk. This bill provides language that authorizes third parties to make such a copy for the limited use of servicing computer hardware components.

This provision does nothing to threaten the integrity of the Copyright Act and maintains all other protections under the act. The intent of the Copyright Act is to protect and encourage a free marketplace of ideas. However, in this instance, it hurts the free market by preventing ISOs from servicing computers. Furthermore, it limits the consumer's choice of who can service their computer and how competitive a fee can be charged.

I want to thank the gentleman from North Carolina (Mr. COBLE) for working with me on this issue, and I urge support of the bill.

Mr. CONYERS. Madam Speaker, I yield the balance of my time to the gentleman from Massachusetts (Mr. FRANK), the ranking member of the subcommittee, whose extraordinary leadership was key to working out the complicated provisions that have been reflected.

Mr. FRANK of Massachusetts. Madam Speaker, I thank my friend, the gentleman from Michigan (Mr. CONYERS) for yielding, and I want to thank my colleagues on that side for rescuing this very important bill from the attempted mugging that some Members of the Republican leadership had in mind. That was not one of the finest hours of this institution when this bill got derailed because of a dispute about a job.

Madam Speaker, I want to express my satisfaction with what we worked out. As Members have mentioned, we have a tough situation here in which we want to protect intellectual prop-

erty rights but not interfere with freedom of expression. In the Committee on the Judiciary, we worked very hard in particular in trying to work out a formula that would protect intellectual property rights and not give the online service providers an excessive incentive to censor. That was the difficult part. What I believe is a very important sign is that we were able to do that.

I want to take this time to contrast this with the failure to do a similar reasonable compromise in the bill we passed recently dealing with child pornography or, rather, pornography in general, because in contrast to this very careful compromise, and we in the Committee on the Judiciary were very focused on this because of our concern for free speech, the House passed a bill which includes language which purports to protect children against pornography which, in fact, goes way beyond that. I am speaking now because I hope the President will be persuaded to veto that bill.

We had a bill which says if someone puts on to the Internet material which is harmful to children, and children can see it, they are criminally liable. In other words, we are not dealing with people who are aiming at children. We also said, by the way, that that prohibition applies to material which is not obscene.

It is going to be stricken by the Supreme Court, but we should not have to depend on the Supreme Court to defend us. So I do want to contrast. It seems to me very important to note the care that we took in the Committee on the Judiciary not to impede on free speech and the lack of care that we have elsewhere.

Mr. CONYERS. Madam Speaker, will the gentleman yield?

Mr. FRANK of Massachusetts. I yield to the gentleman from Michigan.

Mr. CONYERS. Madam Speaker, do the provisions in the bill that the gentleman from Massachusetts (Mr. FRANK) refers to apply to government offices that do the same thing?

Mr. FRANK of Massachusetts. We had a conversation about the Starr report, and I think it is an open question as to whether or not the Starr report would have violated that provision.

The problem is this, and here is what we worked on: We have in this country the freest speech in the world, if it is oral, if it is written, if it is printed, but we are developing a second line of law which says electronically-transmitted speech is not as constitutionally protected. We must reverse that trend or we will erode our own freedoms.

Mr. BLILEY. Madam Speaker, I yield 1 minute to the gentleman from Louisiana (Mr. TAUZIN).

Mr. TAUZIN. Madam Speaker, I thank the chairman for yielding.

Madam Speaker, I speak only to answer the last comments of the gentleman from Massachusetts (Mr. FRANK). The bill we passed on online pornography did not make criminals

out of anyone who puts something on the Internet that may be harmful to minors. What it did was to say that it is criminal for someone to commercially set up a pornography site without establishing some way for parents to be able to say no to that site in their homes. That is all we did.

In fact, if a parent wants to allow his child into that pornographer's site, it can. If the parent wants to look at it, it can. It simply made criminal the act of commercially providing that kind of material without giving parents the opportunity to say no to that material coming into their house.

I hope the President signs that bill. He ought to sign it. It is a good bill that would give parents some control over what comes over the Internet and is available to their children.

Mr. BLILEY. Madam Speaker, I yield 2 minutes to the gentleman from Florida (Mr. STEARNS).

Mr. STEARNS. Madam Speaker, a lot of people have complained today and the last couple of days that Congress has not done anything. I think this bill is a clear example of things we have done. It is probably one of the most important bills that we have passed this Congress. It gives our Nation's copyright holders legal protection internationally to protect their copyright works.

As the chairman, the gentleman from Louisiana (Mr. TAUZIN), mentioned, every year billions of dollars are stolen from American companies from illegal piracy and theft. American companies can now have the freedom to defend their intellectual property.

As my colleagues may recall, the bill as reported out of the Committee on the Judiciary did not contain a definition of "technological protection measure." Myself and other members of the committee were concerned about this lack of such a definition. It was very problematic.

The committee agreed it was an important enough issue to state in its report that those measures covered by the bill are those based upon encryption, scrambling, authentication and some other measure which requires the use of, quote, a key provided by a copyright holder.

Another achievement of the conference was to include specific report language addressing the playability concerns of product manufacturers.

The report explicitly provides that manufacturers or professional servicers of consumer electronics, telecommunications or computing products who take steps solely to mitigate a playability problem may not be deemed to have violated either section 1201 or section 1202.

I would say to my colleagues, we have done something very important today by passing, by recommending this bill to all our colleagues. I urge all my colleagues to vote for it. It is another accomplishment in this session of Congress.

Madam Speaker, this Congress in my opinion has been unfairly maligned about our work



product and our accomplishments. I think we have had two very successful sessions and this bill is proof of our hard work.

In fact, this may be the most important bill that we pass for this entire Congress. This legislation will give our nation's copyright holders legal protection internationally to protect their copyright works.

Every year, billions of dollars are stolen from American companies from illegal piracy and theft. American companies can now have the freedom to defend their intellectual property.

As my colleagues can appreciate, it has been a long and hard process to get us to this point. I am particularly pleased that the conference report addressed issues that I had been concerned about. I would like to comment in particular on some of the most important features of the bill.

As my colleagues may recall, the bill as reported by the Judiciary Committee did not contain a definition of "technological protection measure."

I and other members of the Commerce Committee were concerned that the lack of such a definition was very problematic. The Committee agreed it was an important enough issue to state in its report that those measures covered by the bill are those based on encryption, scrambling, authentication, or some other measure which requires the use of a "key" provided by a copyright owner.

Another achievement of the conference was to include specific report language addressing the "playability" concerns of product manufacturers.

The report explicitly provides that manufacturers or professional servicers of consumer electronics, telecommunications, or computing products who take steps solely to mitigate a playability problem may not be deemed to have violated either section 1201 or section 1202.

By eliminating uncertainty and establishing a clear set of rules governing both analog and digital devices, product designers should enjoy the freedom to innovate and bring ever-more exciting new products to market.

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Mr. BLILEY. Madam Speaker, I yield the balance of my time to the gentleman from New York (Mr. LAZIO), a member of the committee.

The SPEAKER pro tempore (Mrs. EMERSON). The gentleman from New York is recognized for 2 minutes.

Mr. LAZIO of New York. Madam Chairman, let me begin by thanking the gentleman from Virginia, the chairman of the Committee on Commerce, and the gentleman from Louisiana, the subcommittee chairman, and the gentleman from North Carolina, who I have talked about many times at the back rail about this piece of legislation over here, and certainly the gentlemen from the other side.

Madam Speaker, I rise in strong support of this strong balanced bill that we have before us today. The United States must lead the way on copyright law because we have the most at stake. We are far and away the world's largest creator, producer and exporter of copyrighted works. Whether it is movies, music, computer innovation or school

textbooks, American ideas and creativity means jobs, exports and economic vitality.

Copyright law provides incentive to invest in intellectual property, but without strong WIPO protections, this incentive will decline and the Nation will be at a loss because of it.

We must protect American copyright workers from the theft of their property, while maintaining the permitted use of copyrighted works for education, research, and criticism. That is what this bill does.

As the undisputed leader in intellectual property, the U.S. has the most to gain from strong international copyright laws. Our laws should be, and will be, the model for the rest of the world to follow. We have the privilege to set the stage and the responsibility to do it right.

The copyright industry is growing nearly three times as fast as the rest of the U.S. economy. The numbers are extraordinary. We are talking about almost 3 percent of the U.S. work force, with exports of over \$60 billion.

I urge my colleagues to think about the extraordinary opportunities that await us as consumers, as parents, and as officials concerned about the U.S. economy. By providing the appropriate stimulus to copyright owners, a stimulus first established in the Constitution, we allow the electronic marketplace to be the great boon to America that it promises to be.

Mr. COBLE. Madam Speaker, I yield myself the balance of my time.

Madam Speaker, it has been mentioned about the importance of data base, the importance of patent and trademark. These are two areas, Madam Speaker, that cry out to be addressed, and I regret that they were not addressed in a proper and fitting way this session. I hope it can be done next time, in the 106th session of the Congress. I think, from what I have heard today, it will be generously laced with bipartisanship, and I feel optimistic about that.

Having said that, I want to again thank everybody who placed their oars into these waters and I urge the adoption of the conference report on H.R. 2281.

Mr. MARKEY. Madam Speaker, I strongly support passing this bill which implements the World Intellectual Property Organization (WIPO) treaty.

As the digital revolution sweeps over industries and countries it will provide new opportunities for market growth and innovation, easier access to remote information, and new distribution channels for products and services. The United States clearly leads the world in software products such as computer programs, movies, music, books and other multimedia products. In a post-GATT, post-NAFTA environment—in which we have made an implicit national economic decision to essentially let low-end jobs go and migrate to developing countries—we have an obligation as policymakers to ensure that we establish the climate in which America gamers the lion's share of the high end, knowledge-based jobs of the new global economy.

Because digital technology facilitates an almost effortless ability to transmit digitized software information across national borders and also permits exact copies of such work to be made, it is vitally important that the United States take steps to update existing laws by cyberspace. There's no question that protecting the interests of copyright holders will mean that the content community will feel more secure in releasing their works into a digital environment. Because of the worldwide nature of electronic commerce today, it also becomes imperative that we establish treaties with other countries ensuring that our intellectual property—in other words, our high tech jobs—are not compromised overseas.

In deliberating upon this legislation, this Commerce Committee sought to better balance competing interests. This has not been an easy task. Encryption research issues, privacy implications, fair use rights, reverse engineering, and other issues are complicated but represent meaningful public policy perspectives. I am pleased that the bill before us has taken great strides to see that these issues are addressed properly and fairly.

In particular, I commend the conferees for retaining the language that I offered in Committee protecting the individual privacy rights of consumers. This language gives an incentive to the content community to be above board with consumers with respect to personal information that is gathered by technological protection measures or the content or software that it contains or protects. If consumers are given notice of these practices and an opportunity to prohibit or curtail such information gathering then technological protection measures could not be legally defeated. On the other hand, consumers are within their legal rights to defeat such measures if their personal privacy is being undermined without notice or the right to say "no" to such practices. This is a good privacy provision that leaves to the industry the question of whether they want to conspicuously provide notice to consumers of their privacy rights, extending as well the opportunity for a consumer to effectively object to any personal data gathering, and in so doing prevent the defeat of technological protection measures designed to protect the industry's products.

I want to thank Chairman BULEY, Mr. DINGELL, Chairman TAUZIN, Mr. WAXMAN, and many other members for the incredible amount of time and effort that has been put into the effort of resolving outstanding issues. And I want to thank the members of the Judiciary Committee, Chairman HYDE, Chairman COBLE, Mr. CONYERS, Mr. FRANK, Mr. BERMAN and others for their excellent work on these issues. This is a good conference report and I urge members to enthusiastically support it.

Mr. BERMAN. Madam Speaker, I am very gratified that we finally have before us today the conference report on H.R. 2281, the Digital Millennium Copyright Act. Enactment of this legislation will make it possible for the United States to adhere to the World Intellectual Property Organization (WIPO) Copyright Treaty, and to the WIPO Performances and Phonograms Treaty.

These treaties, in turn will lead to better legal protections for U.S. copyrighted materials—movies, recordings, music, computer programs, videogames, and text materials—around the world, and thus will contribute to increased U.S. exports and foreign sales of

this valuable intellectual property, and to a decrease in the unacceptably large levels of piracy these products experience today in far too many overseas markets. As the global market for copyrighted materials increasingly becomes a digitized, networked market, there is no step that Congress can take that is more important for the promotion of global electronic commerce in the fruits of Americans creativity.

This bill is the fruit of many long months of labor and I salute all of those inside and outside this body who worked long and hard together to achieve this goal.

Ms. JACKSON-LEE of Texas. Madam Speaker, thank you for the opportunity to speak on this important bill, H.R. 2281, which amends title 17, of the United States Code. This Bill implements World Intellectual Property Organization's sponsored copyright agreements signed by the United States in Geneva, Switzerland. It also limits the liability on-line and Internet service providers may incur as a result of transmissions traveling through their networks and systems.

Certainly, we all agree that the Internet, the information superhighway, has enhanced and changed our medium of communication forever. With this evolution in technology, the law must conform to provide protection for copyrighted material that is transmitted through this revolutionary tool.

In December 1996, the World Intellectual Property Organization convened to negotiate multilateral treaties to protect copyrighted material in the digital environment and to provide stronger international protection for American recording artists. This bill does not require any substantive changes in the existing copyright laws.

Also, this bill includes language intended to guard against interference with privacy; permits institutions of higher education to continue the fair use of copyrighted material; and a provision to protect service providers from lawsuits when they act to assist copyright owners in limiting and preventing infringement.

H.R. 2281, provides substantial protection to prevent on-line theft of copyrighted materials. This bill demonstrates our commitment to protecting the personal rights and property of American citizens. More importantly, it works to eradicate crime and protect the intellectual property rights of America's corporations. Thus, I am compelled to support this bill.

Mr. DELAHUNT. Madam Speaker, I join my colleagues on the Subcommittee on Courts and Intellectual Property in support of the conference agreement. This bill and the treaties it would implement are of vital importance to America's copyright industries, and I congratulate the conferees on reaching a hard-won agreement in time to send it to the President this year.

The purpose of the treaties is to help curb international piracy of copyrighted works—which costs our country billions of dollars every year—by raising the standards for international copyright protection.

Few states are as seriously affected by software piracy as Massachusetts, which is home to some of the world's leading publishing, information technology and software companies. Last year, some 2,200 Massachusetts-based software companies had 130,000 employees and combined revenues of \$7.8 billion.

Piracy has always been a problem for these companies, but with the advent of the digital age, it has reached epidemic proportions. The

ability to make perfect digital copies at the click of a mouse—of CDs, movies, and computer programs, has been a tremendous benefit to consumers. But it has also created an enormous black market for pirated copies of these works that are indistinguishable from the originals. Indistinguishable except for the fact that the profits go to criminals running underground operations in places like China and Thailand, rather than to the American authors, composers, songwriters, filmmakers and software developers whose livelihoods depend upon the royalties they earn from sale of their works.

The enactment of this legislation is a major milestone in the battle to ensure that American creativity enjoys the same protection abroad that we provide here at home.

I must voice one regret regarding the failure of the conferees to retain the House-passed provision incorporating H.R. 2652, the Collections of Information Antipiracy Act. This measure would have prohibited the misappropriation for commercial purposes of "databases" whose compilation has required the investment of substantial time and resources.

Like other digitized information, databases can be easily copied and distributed by unscrupulous competitors. Yet the people who create and maintain these compilations can do little to deter or punish this behavior, because most databases are not protected under current copyright law.

H.R. 2652 would have amended the copyright law to provide effective legal protection against database piracy. Without this protection, companies will have little incentive to continue to invest their time and money in database development, and the public will pay the price.

I hope that the subcommittee will revisit this subject early in the next Congress, and I intend to do all I can to see that this or similar legislation is enacted into law.

Mr. GOODLATTE. Madam Speaker, I rise today in support of H.R. 2281, the Digital Millennium Copyright Act. I would like to thank both Chairman COBLE and Chairman HYDE for their leadership on this issue. Additionally, I would like to thank them again for asking me to lead the negotiations between the various parties on the issue of on-line service provider liability for copyright infringement, which is included in this important bill.

The issue of liability for on-line copyright infringement, especially where it involves third parties, is difficult and complex. For me personally, this issue is not a new one: during the 104th Congress, then-Chairman Carlos Moorhead asked me to lead negotiations between the parties. Although I held numerous meetings involving members of the content community and members of the service provider community, unfortunately we were not able to resolve this issue.

At the beginning of the 105th Congress, Chairman COBLE asked me to again lead the negotiations between the parties on this issue. After a great deal of meetings and negotiation sessions, the copyright community and the service provider community were able to successfully reach agreement. That agreement is included in the bill we are considering today. No one is happier, except maybe those in each community who spent countless hours and a great deal of effort trying to reach agreement, than I am with the agreement contained in this bill.

Madam Speaker, this is a critical issue to the development of the Internet, and I believe that both sides in this debate need each other. If America's creators do not believe that their works will be protected when they put them on-line, then the Internet will lack the creative content it needs to reach its true potential. And if America's service providers are subject to litigation for the acts of third parties at the drop of a hat, they will lack the incentive to provide quick and efficient access to the Internet. The provisions of H.R. 2281 will allow the Internet to flourish, and I believe will prove to be a win-win not only for both sides, but for consumers, manufacturers, and Internet users throughout the nation.

I would also like to discuss the importance of the World Intellectual Property Organization treaties, and this accompanying implementing legislation, which are critical to protecting U.S. copyrights overseas. The United States is the world leader in intellectual property. We export billions of dollars worth of creative works every year in the form of software, books, videotapes, and records. Our ability to create so many quality products has become a bulwark of our national economy, and it is vital that copyright protection for these products not stop at our borders. International protection of U.S. copyrights will be of tremendous benefit to our economy—but we need to ratify the WIPO treaties for this to happen, and we need to pass this legislation to ratify the treaties.

I would also like to express my understanding of the intent behind the provisions of H.R. 2281 that address certain technologies used to control copying of motion pictures in analog form on videocassette recorders, provisions that were not part of either the original House or Senate bills. That section establishes certain requirements only for analog videocassette recorders, analog videocassette camcorders, and professional analog videocassette recorders.

In other words, these requirements exist only in the "analog" world. The limitations, for instance, with respect to certain transmissions apply only with respect to those transmissions in analog form.

The intent of the conferees is that these provisions do not establish any obligations with respect to digital technologies, including computers or software. Copyright owners are free to use these or any other forms of copy control technology to protect their works in the "digital" world, including in any digital broadcasts, transmissions, or copies.

It is also my understanding that the intent of the conferees is that this provision neither establishes, nor should it be interpreted as establishing, a precedent for Congress to legislate specific standards or specific technologies to be used as technological protection measures, particularly with respect to computers and software. While it is not the intent of the conferees to prejudice or affect ongoing negotiations over digital video technology, it may become necessary in the future for Congress to consider protections for audiovisual works in the digital environment.

The conferees understand that technology develops best and most rapidly in response to marketplace forces, and believe that private parties should be free to apply their ingenuity to develop even better and more effective technologies.

Finally, regulatory agencies should not involve themselves in establishing specific

standards in the digital medium, in particular for software and computers. The technology changes far too fast, much more rapidly than regulatory standards. Therefore, regulation in this area is likely to impede, or in some cases even discourage, the development of new technologies.

This bill is critical not only because it will allow the Internet to flourish, but also because it ensures that America will remain the world leader in the development of intellectual property. I urge each of my colleagues to support the conference report to H.R. 2281.

Mr. KLUG. Madam Speaker, I rise today in strong support of the conference report on H.R. 2281, and to acknowledge my appreciation of the efforts expended to create a rational, balanced bill for the 21st Century.

About two months ago, I stood on this floor and recognized that this Congress faced a difficult balancing act. On the one hand, there is concern for protecting the American creative community—those who make movies and television shows and software and books. On the other hand, in an era of exploding information, and where increasingly having information is having power, we have a heightened obligation to ensure access to that information. We should not be changing the rules of the road in the middle of the game, creating a pay per view environment in which the use of a library card always carries a fee and where the flow of information comes with a meter that rings up a charge every time the Internet is accessed.

With the support of the House Commerce Committee, under the leadership of Chairman BULEY, Representative DINGELL, Representative TAUZIN, Representative MARKEY, and, most significantly, Representative BOUCHER, we were able to implement two changes to the bill to instill the balance envisioned by our constitutional architects and in the long tradition of the Commerce Committee. The first change ensured that information users will continue to utilize information on a "fair use" basis, notwithstanding the prohibition on circumvention. The second change allowed manufacturers of a wide array of consumer products the certainty that design decisions could be made solely on the basis of technological innovation and consumer demand, not the dictates of the legal system.

These critical provisions were regrettably not part of the Senate-passed version of the legislation and, consequently, required negotiation in conference. Although I was not a formal part of the House-Senate conference, I am pleased to support the outcome of those discussions, and to single out the dedicated efforts of Chairman BULEY, Representative TAUZIN, Representative DINGELL, Justin Lilley, Andy Levin, and Whitney Fox to preserve the important improvements wrought by the House Commerce Committee.

The conference report reflects a number of hard compromises, three of which I would like to discuss. First, the conferees maintain the strong fair use provision the Commerce Committee crafted, for the benefit of libraries, universities, and consumers generally. Section 1201(c)(3) explicitly provides a meaningful role, in determining whether fair use rights are or are likely to be adversely affected, for the Assistant Secretary of Commerce for Communications and Information in the mandated rulemaking. I trust that the recommendations made by the Assistant Secretary, given the in-

creasing importance that new communications devices have in information delivery, will be accorded a central, deferential role in the formal rulemaking process.

The second change the conferees insisted upon was a "no mandate" provision. This language ensures that manufacturers of future digital telecommunications, computer, and consumer electronics products will have the freedom to choose parts and components in designing new equipment. Specifically, Section 1201(c)(3) provides that nothing in the subsection requires that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computer product provide for a response to any particular technological measure, so long as the device does not otherwise violate the section. With my colleague from Virginia, Representative BOUCHER, I originally persuaded the members of the Commerce Committee to delete the "so long as" phrase of the original Senate version. Our thinking, confirmed by committee counsel, was that this language was not just circular, but created serious ambiguity and uncertainty for product manufacturers because it was not clear whether a court, judging the circumstances after the fact, would find that specific products fell within the scope of this provision and thus had to be designed to respond to protection measures. And, it is entirely possible that these protective measures may require conflicting responses by the products.

The conferees added back the language we struck, but in a context in which the "so long as" clause had some clear, understandable meaning. The language agreed to by the conferees mandates a response by specified analog devices to two known analog protection measures, thereby limiting the applicability of the "so long as" clause. In my opinion, spelling out this single, specific limitation will provide manufacturers, particularly those working on innovative digital products, the certainty they need to design their products to respond to market conditions, not the threat of lawsuits.

Both of these changes share one other important characteristic. Given the language contained in the Judiciary Committee's original bill, specifically sections 1201(a)(1), (a)(2), and (b)(1), there was great reason to believe that one of the fundamental laws of copyright was about to be overruled. That law, known as *Sony Corporation of America v. Universal Studios*, 464 U.S. 417 (1983), reinforced the centuries-old concept of fair use. It also validated the legitimacy of products if capable of substantial non-infringing uses. The original version of the legislation threatened this standard, imposing liability on device manufacturers if the product is of limited commercial value.

Now, I'm not a lawyer, but it seems irrational to me to change the standard without at least some modest showing that such a change is necessary. And, changing the standard, in a very real sense, threatens the very innovation and ingenuity that have been the hallmark of American products, both hardware and content-related. I'm very pleased that the conferees have meaningfully clarified that the *Sony* decision remains valid law. They have also successfully limited the interpretation of Sections 1201(a)(2) and (b)(1), the "device" provisions, to outlaw only those products having no legitimate purpose. As the conference report makes clear, these two sections now must be read to support, not stifle, staple

articles of commerce, such as consumer electronics, telecommunications, and computer products used by businesses and consumers everyday, for perfectly legitimate purposes.

Finally, the conferees included specific language allowing product manufacturers to adjust their products to accommodate adverse effects caused by technological protection measures and copyright management information systems. These measures could have the effect of materially degrading authorized performances or displays of works, or causing recurring appreciably adverse effects. But, there was real fear in the manufacturing and retail communities of liability for circumvention if they took steps to mitigate the problem. I also felt particularly strong that consumers have the right to expect that the products they purchase will live up to their expectations and the retailing hype. So, the Commerce Committee faced another balancing act—preserving the value of the creative community while also affording consumers some basic protections and guarantees.

We were only able to achieve directive report language on "playability" in the committee process. Using the base established by the Commerce Committee, the conferees were able to craft explicit language exempting makers and servicers of consumer electronics, telecommunications, or computing products from liability if acting solely to mitigate playability problems. With this absolute assurance of freedom from suit under such circumstances, manufacturers should feel free to make product adjustments, and retailers, and professional services should not be burdened with the threat of litigation in repairing products for their customers.

In short, the conference report achieves the goal of implementing the WIPO treaties. But we have done so in a thoughtful, balanced manner that promotes product development and information usage, indeed the very "progress of Science and the useful arts" set forth in the Constitution. I urge my colleagues to vote for this legislation and yield back the balance of my time.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from North Carolina (Mr. COBLE) that the House suspend the rules and agree to the conference report on the bill, H.R. 2281.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the conference report was agreed to.

A motion to reconsider was laid on the table.

#### MESSAGE FROM THE SENATE

A message from the Senate by Mr. Lundregan, one of its clerks, announced that the Senate had passed without amendment a joint resolution of the House of the following title:

H.J. Res. 134. Joint Resolution making further continuing appropriations for the fiscal year 1999, and for other purposes.

#### ANNOUNCEMENT OF INTENTION TO OFFER RESOLUTION RAISING QUESTION OF PRIVILEGES OF THE HOUSE

Mr. TRAFICANT. Madam Chairman, pursuant to clause 2(a)(1) of rule IX, I