

Statement of
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Before the
United States Senate
Committee on the Judiciary
Subcommittee on Intellectual Property
Hearing on the DMCA at 22:
What Is It, Why It Was Enacted,
And Where Are We Now
February 11, 2020

Chairman Tillis and Ranking Member Coons, Members of the Subcommittee,

Thank you for having invited me to share my recollections, and any insights I may retain, on the origins of and rationale for the Digital Millennium Copyright Act. My own experience is confined almost entirely to the policy and technological wellsprings of Section 1201. For me this ranged from the 1981 Court of Appeals decision in the *Betamax* case, *Universal Pictures v. Sony Corporation*, through the DMCA's enactment in 1998.

The Home Analog VCR

The October, 1981 decision of the Court of Appeals for the Ninth Circuit, that publicly selling a video cassette recorder was a secondary infringement of copyright, set off waves of policy and legislative activity that show no signs of calming, despite the reversal of this decision by the Supreme Court in 1984.¹ The initial response of major content industries was to seek royalties on sales of all recording devices and blank media. The initial response of consumer, retail, and manufacturer interests was to form the Home Recording Rights Coalition, or HRRC, which successfully opposed such measures.

The Home Recording Rights Coalition

The HRRC came together when leaders of the Consumer Federation of America contacted Sony, manufacturer of the *Betamax* VCR, and the Consumer Electronics Group of the Electronic Industries Association, which has evolved into The Consumer Technology Association, or CTA, which is how I'll refer to it throughout. Today I'm an outside counsel to

¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (“*Sony*”).

CTA, but then I was counsel to the HRRC, my work supported by electronics manufacturers who were CTA members. In addition to staving off proposals for broad levies on recorders and tapes,² the HRRC worked with the retailers who had established the booming market for movie rental and sales of prerecorded video cassettes, to preserve the copyright “first sale” doctrine, which has legally sustained this market as it evolved from VCR tapes to DVD and Blu-ray rentals. By the late 1980s, however, after digital Compact Discs and Digital Audio Tape recorders had been introduced and more litigation loomed, manufacturers felt obliged to consider and negotiate a “technical solution” that would protect the legitimate expectations of both content owners and device users. From my own perspective, on behalf of HRRC, this was the first step toward the DMCA.

The Audio Home Recording Act of 1992

The digital Compact Disc, an optical recording medium, was introduced by Sony and Philips in 1982. By 1988, 400 million CDs were being sold annually by the recording industry. But record companies had made no provision to encrypt the digital files, and expressed concern that unlike recordings that degrade in quality when copied by analog means, digital recordings made from CDs would remain perfect from generation to generation. So their only recourse when Digital Audio Tape recorders were announced was more litigation, which nobody really wanted. At a meeting in Athens, Greece, international recording and consumer electronics representatives agreed to work together on a compromise that would preserve consumers’ rights to make first generation copies directly from CDs, but constrain the ability to make copies of copies. It was too late to encrypt CDs because tens of millions of players had already been sold. The best available solution seemed to be a legal mandate *on recorders* to look for passive encoding of metadata, balanced by a requirement that such encoding could not be applied so as to prevent users from making first-generation copies.

After hearings and interim drafts of legislation in two Congresses, and concerns expressed by music publishers, telecommunications networks, and computer companies, Congress enacted the Audio Home Recording Act of 1992 (the AHRA). This law provided for control of such “serial copying,” plus a royalty to a collecting society, but applied only to a narrowly defined set of digital devices and media. In exchange, consumers and device manufacturers were granted immunity against copyright infringement suit for the sale or use of a

² I’ve attached an HRRC-sponsored *Record Magazine* ad from September 1985.

defined device, or for any noncommercial audio recording using *any* analog recorder.³ The scope of these technical and royalty obligations soon became subject to litigation in the Ninth Circuit.⁴ Indeed, only two weeks ago, automotive manufacturers and their electronics suppliers needed an opinion by the D.C. Circuit to survive a suit brought against features of car navigation accessories, for a music recording function envisioned by nobody in 1992.⁵ The defendants have prevailed in each case.

Negotiations Toward A Video Home Recording Act

With digital video recording devices about to be introduced, from 1993 to early 1996 representatives of consumer electronics manufacturers met with the Motion Picture Association of America (now Motion Picture Association) and its members to attempt to craft a Video Home Recording Act, also based on a passive data mandate and rules to allow first-generation copies by device owners. Computer and software companies, however, wanted no part of this. When shown a draft, they explained that their devices would be slowed down dramatically by having to search for and detect passive electronic triggers.

Copy Protection Technical Working Group

In 1996, representatives of Consumer Electronics, Motion Picture, and “Computer” industries agreed to form the Copy Protection Technical Working Group (“CPTWG”). This was to be, and remains to this day, an open forum to air and discuss more sophisticated technological solutions to protect commercially-sold copies of motion pictures that would not impair consumer enjoyment of devices and content. Public interest groups participated, the press was allowed in, and any market-based discussion was forbidden. One encryption-based technology aired at CPTWG, after development by an independent consortium, became the basis for protecting DVD digital video discs when they were introduced in 1997.

NII Green Paper and White Paper

There was a parallel effort by counsel for these industries to develop a new approach to legislation, but discussions were overtaken by proposals from the Administration’s National

³ See 17 U.S.C. § 1008.

⁴ *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072 (9th Cir. 1999).

⁵ *Alliance of Recording Artists and Companies, Inc. v. Denso International America, Inc.*, No. 18-7141, Consolidated with No. 18-7172 (D.C. Cir. Jan. 28, 2020). I am a counsel of record for one of the defendant companies. See,

https://scholar.google.com/scholar_case?case=361112419669671024&q=ALLIANCE+OF+ARTISTS+AND+RECORDING+COMPANIES,+INC.,+v,+Denso&hl=en&as_sdt=20006&as_vis=1.

Information Infrastructure Working Group – the July, 1994 “Green Paper,”⁶ and its final, September, 1995 “White Paper.”⁷ The White Paper proposed a broad and plenary anticircumvention precursor to Section 1201 that would have applied to “any process, treatment, mechanism, or system.” HRRC and other opponents argued successfully against any legislation based on these proposals. Representatives of electronics, library, public interest, and university groups also opposed such concepts in the December 1996 World Intellectual Property Organization Diplomatic Conference on Copyright and Neighboring Rights.⁸ (For an overview of reactions to and interactions of these proposals and outcomes, I recommend Chapter 9 of Professor Jessica Litman’s book, *Digital Copyright*.⁹)

The WIPO Treaties

In the late 1980s, WIPO began considering the terms of a Model Law for copyright and for sound recordings (which many countries do not treat as copyrighted works). Early drafts proposed to assess a copyright royalty levy on all private reproduction activity, from photocopying machines to videotapes, and to require regulations to impose technological restrictions on the use of any equipment that “might normally be used” for private home video and audio recording. The HRRC urged U.S. officials to oppose these provisions as directly at odds with the Supreme Court *Betamax* decision and longstanding legislative history that home audio recording could be fair use.¹⁰ In the midst of the domestic debate over the AHRA, the WIPO draft Model Law proposed to prevent “the sale or rental of any device or means specifically designed or adapted to circumvent any device or means intended to prevent or restrict reproduction of a sound recording... .”¹¹

⁶ 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), https://books.google.com/books?id=R7Wgm_II2f0C&printsec=frontcover&source=gbs_ViewAPI#v=onepage&q&f=false.

⁷ THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INFORMATION INFRASTRUCTURE TASK FORCE, BRUCE A. LEHMAN Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, CHAIR (Sept. 1995), <https://files.eric.ed.gov/fulltext/ED387135.pdf>.

⁸ See World Intellectual Property Organization, *Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions Geneva 1996*, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_348_vol_ii.pdf.

⁹ Litman, Jessica D., *Digital Copyright*, Published by: Ann Arbor, MI: Michigan Publishing, University of Michigan Library, 2017, DOI: <https://quod.lib.umich.edu/m/maize/mpub9798641>.

¹⁰ See Sony, 464 U.S. at 472-473, citing 117 Cong. Rec. 34748-34749 (1971) (colloquy of Reps. Kazen and Kastenmeier) (“the bill protects copyrighted material that is duplicated for commercial purposes only”).

¹¹ Article 24 of the Draft WIPO Model Law on the Protection of Producers of Sound Recordings, MLSR/CE/I/2 at 51 (March 30, 1992).

This multi-year process culminated with the 1996 WIPO treaties adopting international legal norms to protect copyrighted works distributed in digital formats. A key treaty provision, in both Article 11 of the WIPO Copyright Treaty¹² and Article 18 of the WIPO Performances and Phonograms Treaty,¹³ required each participating country to provide “adequate legal protection and effective legal remedies against the circumvention of effective technological measures” such as encryption, when applied to protect copyrighted works against acts that were not authorized by the copyright owner or permitted by law. Accordingly, countries could comply with these obligations by imposing liability for circumvention in furtherance of infringement, while exempting circumvention for non-infringing uses.

The WIPO Treaties Implementing Legislation

At the outset of the 105th Congress, the Administration proposed legislation to implement the WIPO outcomes, but with a far broader imposition of anticircumvention requirements than anything necessary to comply with the WIPO treaties. Indeed, the HRRC and its library and university allies in the newly formed Digital Future Coalition (DFC) argued that existing U.S. law was sufficient, so no implementing legislation was necessary at all.

Our DMCA Frame of Reference and Concerns

As we entered this new legislative debate, based on our 20 years of litigation, eight years of negotiation with content owners, and a year of intensive discussions with computer industry representatives, our assumptions and perspectives were:

1. We understood the objective of the content industries, and any legislation, to be to protect *expressive artistic works* from digital copying and Internet distribution.
2. We could no longer ignore computer technologies, and user generation of content, as means of copying and distributing music and literary and audiovisual works.
3. Passive means of “protection,” such as metadata status marking, could not be acceptable because computers would have to be excluded from any mandate, dooming any attempt to negotiate and recommend one.
4. Thus any definition of an “*effective technological measure*” against copying must be encryption-based, and should be carefully limited so as to protect only *expressive literary and other artistic content* from copying for the purpose of infringement.

¹² WIPO Copyright Treaty, <https://wipolex.wipo.int/en/text/295157>.

¹³ WIPO Performances and Phonograms Treaty, <https://wipolex.wipo.int/en/text/295477>.

5. Any such measure should not intrude on fair use, as protected by Section 107 of the Copyright Act, and, in the context of user rights and expectations, by the Supreme Court in its 1984 reversal of the *Betamax* case.

The HRRC vociferously opposed the Administration's "WIPO Implementation" bill because it ignored all of these concerns. Our reaction was expressed in the "*Bill Named Sue*" testimony of HRRC Chairman Gary Shapiro in the Sept. 17, 1997 House Subcommittee hearing on H.R. 2281, a transcript of which I have attached to my statement.¹⁴

Outcomes

Upon final passage of the DMCA as it emerged from Conference, we had succeeded in maintaining the notion that technical measures must be "effective," but failed at including any definition in Section 1201(b), such as the one proposed by Senator Ashcroft in S. 1146 or the similar one urged by Reps. Boucher and Campbell in H.R. 3048.

Section 1201(c)(3). Our main accomplishment was the addition, by this Committee, of Section 1201(c)(3) (in S. 2037, §1201(d)(3)), to avoid any mandate to design devices and components to search for and respond to passive content encoding:

"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."¹⁵

Section 1201(k). HRRC and CTA also, working with the MPA, were able to add a vestige of our Video Home Recording Act draft, Section 1201(k), which imposed a narrowly defined mandate in favor of "Macrovision" technology as applied to VHS format VCRs. This provision did embrace the AHRA and VHRA concept, still widely applied in the Cable TV world, of allowing first-generation recordings but not copies of copies. (It was also, like most design mandates, a solution to yesterday's problems that soon became obsolete.)

¹⁴ On that day Mr. Shapiro was preceded by the legendary singer Johnny Cash, who praised the bill as protecting the work of artists. Mr. Shapiro warned that such a broad and vague bill would encourage rather than avoid copyright litigation, so he called it "*A Bill Named Sue*." Chairman Coble appreciated the song reference but later proceeded to markup, nevertheless.

¹⁵ Along the way it picked up language threatening to make it circular: "... 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)."

Concerns

HRRRC and our allies in DFC were disappointed that Section 1201 failed to resolve our concerns about its scope and the lack of protection for **fair use**, and its broad “**trafficking**” concept **not tied to infringement**, but we did not attempt to prevent ultimate enactment of the law as it emerged from conference. It did include the triennial Section 1201(a)(1) Copyright Office proceedings, and of course also included Section 512.

The areas in which we failed can be read in the Register of Copyrights’ Triennial reports under Section 1201(a)(1) – the user exemptions sought every three years because the law, as enacted, remains too vague, covers too much, and applies to embedded software as well as expressive artistic works, thus making it difficult or impossible to download and re-install software embedded in a device that you own, such as a farm tractor. Such problems were warned of in a March 10, 1998 DFC lobbying “handout,” and in the text of H.R. 3048 which, like Senator Ashcroft’s S. 1146, would have prevented intrusions on the rights and legitimate expectations of future owners of devices with embedded software, such as printers and tractors.

The (then) Acting Register of Copyrights recognized in the 2018 Triennial Round that device users such as farmers are entitled, as “users,” to expert assistance when needing to circumvent protection measures to repair their own equipment during their short growing seasons. But the Acting Register maintained that any assistance in *obtaining* software in order to perform such necessary and lawful circumvention would venture into “trafficking” and thus is beyond the Librarian’s jurisdiction.¹⁶

Litigation

Manufacturers hoped that this law would provide a respite from copyright litigation and the overhang of statutory damages that could bankrupt most any maker of devices. Shortly after passage, lawsuits did ensue, but within the limitations of the DMCA’s terms, courts have often managed to limit scope to approximately what was intended. Circumvention of the CSS encryption protecting DVDs violated Section 1201;¹⁷ circumvention of protections over garage

¹⁶ See Section 1201 Rulemaking: Seventh Triennial Proceeding October 2018 Recommendation of the Acting Register of Copyrights at 224 – 226.

¹⁷ *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001).

door openers,¹⁸ printer cartridges,¹⁹ and coffee pods²⁰ did not. Technologies that precluded unauthorized access to and copying of media streams were “effective technological measures;” but proprietary media formats alone were not.²¹

While HRRC and allies viewed the Section 1201 outcome as, to borrow a phrase, not entirely to our advantage, we had a fair hearing – particularly in the Senate – and achieved some significant legislative history that has played a role in influencing courts to read this law with an eye to preserving both innovation and the reasonable expectations of device users.

¹⁸ *Chamberlain Grp. v. Skylink Tech.*, 381 F.3d 1178 (Fed. Cir. 2004). *Chamberlain* holds the minority view that circumvention for non-infringing purposes does not violate Section 1201(a). See *MDY Indus. v. Blizzard Entm’t*, 629 F.3d 928 (9th Cir. 2010); *Universal City Studios v. Corley*, 273 F.3d at 443-444.

¹⁹ *Lexmark Int’l v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004).

²⁰ *In re Keurig Green Mountain*, 383 F. Supp. 3d 187 (S.D.N.Y. 2019) (an antitrust case, no mention of anti-circumvention defense).

²¹ *RealNetworks, Inc. v. Streambox, Inc.*, 2000 U.S. Dist. LEXIS 1889 (W.D. Wash. Jan. 18, 2000) (I have issues with some of the *no mandate dictum*).

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TAPE YOURSELF. AND PAY A RECORD COMPANY?



Do you use blank tapes to:

- tape band rehearsals?
- tape auditions?
- tape albums to play in your car?

Do you use blank tapes for taping college lectures, family events, letters to friends and family, and taping off the air?

The recording industry is pushing Congress to make you pay a tax every time you buy a blank tape and every time you buy recording equipment.

How big a tax?

- a dollar or more extra on blank tape.
- an additional 10-25% on tape decks, portables, and personal stereos.

Record companies are demanding your bucks because, they say, home taping hurts their sales. These are the very same companies whose sales and profits hit an all-time high in 1984.

What can you do to stop this tax?

Fill out the coupon and mail it to us. We will send it to the Members of Congress who represent you. Your name will be added to the tens of thousands who have already told us they don't want to pay recorder or tape taxes. Call our toll free number—**800-282-TAPE**—if you would like to do more to stop the taping tax. The threat is real. The time to stop the tax is now!

The Audio Recording Rights Coalition is a coalition of consumers, retailers and manufacturers of audio products dedicated to preserving your right to use these products free of private taxes or government interference. For further information call toll free, **800-282-TAPE**.

TO: Audio Recording Rights Coalition

P.O. Box 33705
1145 19th Street NW
Washington, DC 20033

Please tell my representatives in Congress that I oppose H.R. 2911 or any legislation that would impose taxes on audio recorders or blank tape.

Name (print) _____

Address _____

City _____ State _____

Zip _____ Phone _____

Signature _____

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Mr. COBLE. Mr. Shapiro is recognized for 5 minutes.

STATEMENT OF GARY SHAPIRO

Mr. SHAPIRO. Thank you, and in deference to Mr. Frank and you, I will not introduce myself again.

The Home Recording Rights Coalition was formed in 1981 in response to a court opinion which held that VCRs were illegal, and indeed, with this legislation that is before us today, that kind of opinion could have been law. The case actually went to the Supreme Court in the famous Sony Betamax case—but in every Congress we seem to be back here with a proposal killing or crippling or taxing this golden goose of the VCR.

So I join my colleagues today in expressing grave concerns over the section 1201 provision of H.R. 2281. This provision would give copyright proprietors new, ill-defined and unlimited rights over the availability in the marketplace of devices that are otherwise perfectly lawful. The bill would effectively reverse the Supreme Court's Betamax decision, crumbling the very foundation of free commerce in high-technology devices. It would deny any technical, scholastic and other creative users the hardware and software tools they need to do their work; and, of course, it would again subject new recording and computer products and those who buy them to the risk and uncertainty of litigation. Indeed, if this legislation is renamed, it could be called "a bill named sue."

These are strong criticisms, but they are inescapable. The proponents of section 1201 should simply admit that it nullifies the Betamax holding. The Court ruled there that devices having any commercially significant noninfringing use may be lawfully sold, and time-shift home recording through a VCR is such a lawful use.

Now section 1201(b) would ban a device upon a finding that it or any component or part is designed, used or marketed for the purpose of failing to respond to any so-called technical protection measure. The device would be banned even though it has significant or other noninfringing uses.

But Section 1201 goes further. It does not require that the circumvention even be in aid of copyright infringement. It outlaws devices that do not meet its vague design standards, without any requirement that the so-called circumventing use is a copyright infringement. So you have library scholars, computer software engineers and others who will not even be able to obtain these devices. That is why, Mr. Frank, three people cannot even exercise their fair use rights because if this legislation passes they would not be able to obtain the products.

Further, nothing in section 1201 would prevent the technical protection of public domain material. It would even permit encoding of broadcast television by Macrovision to prevent perfectly legal recording. In other words, the whole concept of recording as we know it by consumers is somewhat in jeopardy.

Section 1201(b) is written to cover not just black boxes, but also parts and components of legitimate multipurpose devices such as recorders, computers and other products. So the design of these devices will become an issue of fact to be sorted out by courts and juries in cases that may drag on for years. So far it is—(A), (B) and (C), which supposedly guide the courts, are difficult to apply de-

vices to the whole. To apply them to the selection of each and every component of a device requires that the court design these devices from the ground up.

These definitions obscure rather than clarify. The definition of "technological protection measure" in 1201(b)(2)(B) reads as if a line has been dropped by the printer. I have read it over and over again, but apparently to avoid using the words "copyright infringement," the drafters wrote a key definition that makes no sense.

There is no definition whatever of the effective technologies protected against circumvention. Thus response is required to any measure applied to any signal by any copyright owner. Hardware and software designers would have an open-ended obligation this year to comply with 2, 5, 10, 50, a thousand different marking schemes applied to any analog or digital signal no matter how technically unreasonable, inefficient, costly, unfair or even inconsistent with each other. The costs of this provision could kill entire generations of future beneficial technologies.

Nothing, as Commissioner Lehman indicated, nothing in the WIPO Treaty requires any restrictions whatsoever on the design of devices or the introduction of technology to the marketplace. The treaty says that national law should provide legal remedies against circumventing conduct for proprietors who use effective technological measures to guard against unlawful conduct. Thus, legislation aimed at infringing conduct would satisfy our U.S. treaty obligations, and indeed that is why we support—and we do support—the treaty.

Some proponents of H.R. 2281 say it is aimed only at these black boxes that circumvent particular copy protection systems, but they don't all say that on the other side, and that is not what the bill says. Nor have I yet heard any authoritative assurance that section 1201 does not apply to the design and component selection of new VCRs.

We have tried different approaches, we have worked, but this has become a moving target, and it is time we stop focusing on the technical and focus on the conduct. We are willing to work, and I thank you, Mr. Chairman, for having invited me to appear.

Mr. COBLE. Mr. Shapiro, I regret that Johnny Cash was not here to hear your comment about the bill named sue. I am sure he would have enjoyed that.

[The statement of Mr. Shapiro follows:]

PREPARED STATEMENT OF GARY J. SHAPIRO, PRESIDENT, CONSUMER ELECTRONICS
MANUFACTURERS ASSOCIATION

Chairman Coble and Members of the Subcommittee, I am pleased to appear today on behalf of the Home Recording Rights Coalition (HRRRC), of which I am Chairman, and the Consumer Electronics Manufacturers Association (CEMA), which I serve as President.

CEMA is a sector of the Electronic Industries Association (EIA). CEMA represents manufacturers of television and stereo receivers, video and audio recorders and players, personal computers, multimedia devices, and hundreds of other consumer electronics products. Our members represent about 250,000 U.S. manufacturing jobs and about \$64 billion in annual sales.

The HRRRC was formed in 1981, in response to a court opinion, and proposed legislation, that would have banned the sale of home recording devices to consumers. Although the Supreme Court preserved the right to sell home video recorders in its 1984 "Betamax" opinion, in almost every Congress someone has proposed killing off, crippling, or taxing this golden goose. HRRRC has therefore remained active and vigi-

lant. It includes consumer electronics manufacturers and retailers, consumer organizations, service associations, and others interested in the personal, non-profit use of consumer electronics recording equipment.

Today, on behalf of HRRC and CEMA, I want to add my concerns over, and criticisms of, H.R. 2281 to those of other industries and user groups, and focus in particular on its proposed new Section 1201 of the Copyright Act. This provision would give copyright proprietors new rights, well beyond those conferred by the copyright law or necessary to implement the WIPO treaties.

Essentially, the new Section 1201 would make designers of new devices, such as computers and VCRs, responsible for compliance with any and all technical anti-copy measures chosen by anyone who transmits a signal or distributes a program—irrespective of whether copying the program would constitute copyright infringement. It would invite courts to declare new models unlawful based only on their designs, components, and capabilities.

It would effectively reverse the Supreme Court's "Betamax" decision, undermining the very foundation of free commerce in high-technology devices.

It would deny to technical, scholastic, and other creative users the hardware and software tools necessary to do their work, whether or not that work would infringe any copyright right of any proprietor.

It would toss entirely into the hands of the Federal judiciary the question of when devices can be kept from the market by copyright proprietors, without giving the courts any sensible, useful or workable guidelines as to what to do.

In short, we would be back to the chaos that existed before the Betamax opinion. But at risk would be not only new versions of the familiar VCRs and audio recorders, but also all of the computer and telecommunications hardware and software products that have come on the scene in the past two decades.

Mr. Chairman, I know these are strong criticisms. But I am afraid they are incapable.

PROPONENTS SHOULD ADMIT THAT SECTION 1201 NULLIFIES THE 'BETAMAX' CASE

First, it would be helpful to the debate over this legislation if supporters would candidly acknowledge the obvious—that it does negate the Supreme Court's 1984 holding in the Betamax case. The Court, confronted for the first time with the challenge of relating the public sale of devices to questions of contributory copyright infringement, ruled that products having any commercially significant non-infringing use may be lawfully sold, and that time-shift home recording is such a lawful use.

But Section 1201(b) would allow a court to ban a new VCR or computer if a jury should decide that any component or part is designed, used, or marketed for the purpose of failing to respond to any anti-copy measure applied to any signal or program. The device would be banned even though it has commercially significant fair, or otherwise noninfringing, uses under the Copyright Act. Let's be honest and admit this is a nullification of the Betamax holding.

The fact that this bill would nullify such an important precedent is the beginning, not the end, of this legislative debate. But it ought to give one pause. Whether to keep any device off the market because it might be used in objectionable ways is a fundamental question. The courts and the Congress heard many horror stories as to damage the home VCR would do to the entertainment industry. The Supreme Court construed U.S. law, however, as holding individuals primarily responsible for their own conduct. It ruled that we should not lightly keep articles of commerce out of citizens' hands.

We call upon supporters of this legislation to admit that it nullifies the Betamax decision because they should face the responsibility and consequences of causing such a basic shift in American jurisprudence. Even the motion picture industry has recognized that keeping home VCRs off the market would have been an enormous mistake. Have the supporters of this legislation fully considered the implications of so generally inviting the courts to issue edicts against new generations of digital devices?

SECTION 1201 OUTLAWES CIRCUMVENTION WITHOUT REGARD TO COPYRIGHT INFRINGEMENT

Section 1201 goes much further than nullifying the Betamax holding. It does not even require that the "circumvention" be in aid of copyright infringement. Let me repeat that: Section 1201 outlaws devices that do not meet its vague design standards, without any requirement that the so-called "circumventing" use is a copyright infringement. So, while the fair use rights of librarians, scholars, computer software engineers and others are not attacked directly, they are also effectively nullified be-

cause these users will not be able to obtain the devices that allow them to exercise these rights.

COVERAGE OF "PARTS AND COMPONENTS" PUTS THE COURTS IN CHARGE OF DESIGN OF INTEGRATED, MULTIPURPOSE DEVICES

Third, the fact that 1201(b) covers "parts and components" guarantees that the legitimacy of the design of integrated, multipurpose devices such as recorders, computers, players and accessories, will become an issue of fact to be sorted out by courts and juries. Courts would have to decide, after years of fact-finding and argument, whether the selection of components in a recorder or PC design runs afoul of the vague and broad intention and purpose criteria of 1201(b)(1) subparts (A), (B), and (C).

These criteria are difficult enough to interpret as they might apply to the devices themselves; to apply them to the selection of each and every part and component of a device is nothing less than inviting the courts to design these devices from the ground up. The arbiters of new product design should be consumers, not judges.

THERE IS NO EFFECTIVE DEFINITION OF EFFECTIVE "TECHNOLOGICAL PROTECTION MEASURE"

The purported definitions of "circumvention" and "technological protection measure" provide no assistance whatsoever. Indeed, the definition of "technological protection measure" in 1201(b)(2)(B) reads as if a line has been dropped by the printer. It says, in its entirety (emphasis added):

"(B) 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 OF A COPYRIGHT OWNER UNDER TITLE 17."

Why is the language so garbled? What is missing? What is missing is, first, any mention that the measure must protect against infringement of copyright. That's why the sentence is constructed as a body without a head.

Second, what's missing is any definition or limitation of the "effective" technologies protected against "circumvention." A court must conclude that any measure whatsoever, applied by any proverbial "Tom, Dick or Harry," for the purpose of protecting anything owned by a copyright owner, whether infringed or not, must be acknowledged and responded to in the design of a product. So this definition is circular: IT MAKES ANY TECHNOLOGY "EFFECTIVE" BY IMPOSING AN OBLIGATION OVER THE SELECTION OF DEVICE COMPONENTS so as not to "circumvent" whatever technology has been applied by literally anybody, for any purpose.

The result, Mr. Chairman, is to impose on hardware and software designers an open-ended obligation to comply with any technological marking, alteration, or distortion applied to any analog or digital signal, whether or not copying would constitute infringement—no matter how technically unreasonable, inefficient, costly, and unfair to consumers compliance would be under the circumstances.

The effect of this provision is to put designers of new products into a technological straightjacket. Suppose one of Tom, Dick or Harry's "technical protection measures" operates by working on the XYZ circuit of a recorder or computer. A designer sees a way to make a faster, better, less costly device by entirely eliminating the XYZ circuit in the next generation device. Is this "circumvention" under 1201(b)(1)(A), (B) or (C)? The answer will always be an issue of fact for a jury. The more innovative the designer, the more he or she, and the company's products, will wind up in court.

One thing we have learned is that we should never make general assumptions about where new product design will go. For example, the consumer electronics and motion picture industries just last year worked out a proposed signal "marking" system that would be useful as part of a limited and balanced copy protection technology. We learned, however, that computer designers would be severely constrained if computers were forced to "look" for these particular marks. We also learned that computers do not, and cannot easily be made to, respond to Macrovision signals on analog inputs. So even where several parties sit down together, with full information and the best faith in the world, they might make assumptions that are not valid across the board. To impose open-ended and unilateral design obligations, as this legislation would do, would be to court disaster.

Manufacturers, retailers, and ultimately consumers would remain unsure whether any new hardware or software product would be available or supported in the marketplace. This would chill the market for new recorder and computer designs, hurting everyone—including the entertainment and computer software industries. The

Congress and courts, together with those in the private sector who went for the quick fix, could kill an entire generation of golden geese.

THE 1201(D) "SAVINGS CLAUSE" SAVES NOTHING AND NOBODY

Much has been made of the so-called "savings clause," section 1201(d), which purports to preserve existing user rights, including fair use. This provision is simply irrelevant to the actual damage done by Section 1201. If a device is banned on the basis of its use to "circumvent" some technological protection measure, the user never gets to make any use of it, fair or otherwise.

Nor does this provision allow "fair use" to be invoked as a defense for a product design that enables fair uses by consumers. Since 1201(a) and (b) establish a new right of proprietors to have devices declared illegal irrespective of their fair uses, 1201(d) does nothing whatever to limit the scope or application of these subsections.

THE WIPO TREATIES CLEARLY DO NOT REQUIRE THE REGULATION OF DEVICE DESIGN BY COURTS

Mr. Chairman, I can say to you with some assurance that nothing in the WIPO treaties requires any restrictions whatsoever on the design of new devices, or the introduction of technology to the marketplace. I am proud to say that HRRC and CEMA played an active and constructive role in proposing and crafting the private sector consensus that resulted in the treaty provision on circumvention. The U.S. delegation initially had proposed a device-specific measure, very similar to the one on which this Subcommittee took no action in the last Congress. When that proposal attracted little support from other delegations, the Administration then moved to embrace the provision supported by the U.S. private sector, which does not impose such obligations. The treaty provision, unlike Section 1201, also is limited to protection from acts that otherwise are not permitted by law.

The treaty provision says that national law should provide legal remedies, against circumventing conduct, for proprietors who use "effective technological measures" to guard against unlawful conduct. Legislation aimed at conduct that infringes copyright by circumventing defined effective technological measures would more than satisfy any U.S. obligations under the treaties, and would show the rest of the world that the United States takes its obligations seriously and expects others to do likewise.

Proponents of H.R. 2281, and of the proposal in the last Congress, have claimed that we and others have exaggerated the threat to consumers posed by Section 1201. They say it is aimed only at "black boxes" that circumvent particular copy protection systems. But that's not what the bill says, nor have I yet heard any authoritative assurance that it does not cover the design and component selection of new VCRs, computers, playback and transmission products, and a host of other devices. In several years, now, of trying different approaches to drafting legislative and treaty provisions, proponents have never been able to cover their target, and only their target, in a few paragraphs.

Mr. Chairman, I must say that this year the Administration did do a good job of listening to various points of view. With the best intentions in the world, however, they were unable to both satisfy the hopes of some in the content community and come up with a two-paragraph "device" provision that works. In my sixteen years of involvement in these copyright issues, I have learned that there are no shortcuts, no easy paths.

TRYING TO REGULATE DEVICES IN IMPLEMENTING LEGISLATION SHOULD BE ABANDONED AS A DRY WELL

On behalf of HRRC and CEMA we have indeed been willing to sit down with the entertainment industry representatives and draft balanced, specific proposals to protect their new products in the circumstances they most worry about, yet also protect the legitimate rights and expectations of consumers. In fact, we have agreed with motion picture industry representatives as to both the results we would jointly propose, and the means of achieving them. We are no longer the only fish in this pond, however, and, as I mentioned, we found that our joint ideas were not acceptable to representatives of other industries, particularly information technology companies.

Our private sector, voluntary negotiations with respect to various technologies have been instructive for everyone. We have joined in multi-industry standards proceedings to address the challenges that we jointly acknowledge. I personally hope that the result will be balanced, carefully considered legislation that protects consumers' rights yet provides appropriate legal support for private sector standards that emerge from this ongoing process.

In the context of WIPO implementing legislation, we also met with entertainment industry representatives and tried our very best to negotiate a provision that would be acceptable to them, the computer industry, and us. Anything we could live with, however, was dismissed as insufficiently helpful to them. When we asked for interpretations as to whether the provisions they favored would constrain the design of general purpose products such as VCRs and computers, they could not give any answer on which all the entertainment representatives agreed.

It should be clear by now, based on our efforts and experience, that a two-paragraph treaty implementation provision is a postage stamp that cannot be stretched to cover both the entertainment industry's wish to regulate devices, and our own concerns about the consequences. Our friends' support for grafting a short, one-sided "device" provision onto the implementing legislation is understandable opportunism, but opportunism nevertheless. I believe this Subcommittee would do everyone involved a service were it now to conclude that the attempt to regulate general purpose devices by means of Section 1201 has failed and ought to be abandoned.

I appreciate having been invited to appear today, and want to assure the Subcommittee that CEMA and HRRC stand ready to work to implement these treaties. We will support unconditionally any implementing legislation of appropriate scope and balance. We will continue to work, in other legislative contexts, to address the needs of copyright proprietors in ways that are appropriately specific and well considered.

Mr. COBLE. Mr. Belinsky, good to have you with us, and you are recognized for 5 minutes

STATEMENT OF MARK BELINSKY

Mr. BELINSKY. Thank you, Mr. Chairman, Members of the committee. Thanks for having me here. My name is Mark Belinsky, and I am the Vice President of the Copy Protection Group at Macrovision Corporation of Sunnyvale, California.

Macrovision strongly supports H.R. 2281 and in particular the principles behind the anticircumvention legislation proposed in section 3. We do have a few suggestions for making the legislation more effective for both copyright owners and owners and users of the technological protection measures described in the bill.

First I would like to begin by providing you with Macrovision's perspective on the losses sustained by major motion picture studios and other video rights owners from unauthorized consumer copying. These perspectives are based upon our position as a leading developer and supplier of technological prevention measures for the video industry.

For the better part of the last 14 years, Macrovision's technological protection measures have been used by major motion picture studios, cable TV companies, satellite broadcasters and over 1500 small special interest or vertical market video producers to provide consumers with access to their copyrighted video works, but to limit unauthorized use or copying when such rights have not been granted.

Based upon research that we and others have conducted, the losses sustained by the major motion picture studios and other video rights owners attributed to unauthorized access and copying of copyrighted video programming in the U.S. alone are in the billions of dollars. Internationally the losses are at least as large, and I might add that the percentage of international sales for the video industry continues to grow very rapidly.

Macrovision's core copy protection technology has become the worldwide standard for copy protecting prerecorded video cassettes and safeguarding the interests of copyright holders both in the U.S. and abroad. Over 1.7 billion video cassettes worldwide have been

H.R. 2281 – Myths and Facts

This document responds to a number of points made by various parties in connection with H.R. 2281, in particular in relation to the mark-up of that legislation by the Subcommittee on Courts and Intellectual Property. The Subcommittee approved H.R. 2281 with only minor modification and rejected amendments, offered by Representatives Rick Boucher and Zoe Lofgren, intended to mitigate some of the most significant problems with this legislation.

1. **Myth:** The WIPO Treaties require the United States to enact legislation that will prohibit the manufacturing of devices and components of devices that incorporate technologies that circumvent copy protections.

Fact: As the Commissioner of Patents and Trademarks confirmed in testifying before Congress, the Treaties do not require a device-oriented approach. The WIPO Diplomatic Conference specifically rejected the U. S. proposals that would have required signatory countries to prohibit the manufacture, importation or sale of devices that enable circumvention. Instead, the Treaties require that signatory countries have adequate legal measures and effective remedies against the act of circumvention, and make clear that the legal measures should not restrict acts that are permitted by legal doctrines, regardless of whether copyright holders wish to authorize such acts. This was intended to preserve users' rights under, among other things, the fair use doctrine in U.S. law.

2. **Myth:** The bill will not harm legitimate reverse engineering, testing of encryption systems, or academic study of how computer programs work.

Fact: The bill's failure to focus on activity that is infringing would make illegal activities that are otherwise perfectly legitimate and standard in today's design, testing and academic settings. Even if the Administration's bill did allow for these activities, manufacturers could not manufacture the products that would allow for this "legal" activity to occur.

3. **Myth:** "Circumvention" involves unlawful acts.

Fact: "Circumvention" by itself can be done for legitimate purposes, including the reverse engineering, testing, and academic study purposes noted above. In numerous cases, such as the Ninth Circuit's Sega v. Accolade decision and the Fifth Circuit's Vault v. Quaid decision, courts have specifically approved of acts and products that circumvent technological protections where the purpose of the circumvention was permitted under copyright law.

4. **Myth:** The legislation must go forward unless opponents can show specific products and technologies that are or would be inhibited by its prohibitions.

Fact: This stands the normal legislative inquiry on its head. Congress should instead be asking why this legislation is necessary, given that existing law already

has enabled copyright owners to successfully enjoin and obtain damages against manufacturers of every known "black box" circumvention device used for infringement. Further, cooperative technical developments have allowed introduction into the marketplace of truly effective copy control technologies backed by legally enforceable licensing requirements.

Moreover, while there are products and technologies that can be and have been identified as being adversely affected by this legislation, the more important question is: what technologies and products will never be developed because of the bill's restrictions? If one looks back only five years, technology development has taken us in directions that would not have been anticipated. At that time, few would have predicted the explosion of technology in relation to the Internet, personal computers, DVD, palmtop full-function computers, small dish satellite television delivery – to name just a handful of major technologies and products now in use.

5. **Myth:** H.R. 2281 does not overturn the Supreme Court's decision that reaffirmed the right of individuals to tape programs in their homes. (Sony v. Universal)

Fact: The bill would negate the legal standard established in this case and replace it with a wholly new test for determining when a product is prohibited based on its technical capabilities. H.R. 2281 would outlaw devices based on the potential to circumvent copy protections without regard to other legitimate uses of the technology and without regard to whether the circumvention involved infringed even a single copyright. In contrast, the Supreme Court's test safeguards the right to sell "staple articles of commerce" and, accordingly, looks to whether such a product has substantial non-infringing uses. As the Court said, this approach recognizes that copyright law balances the monopoly rights of copyright holders against the sometimes inconsistent public interests of users and developers of technology. By specifically rejecting an amendment that would have codified the Supreme Court's decision, the Subcommittee confirmed that it has rejected the Court's balanced, objective standard, and wishes to substitute a wholly new, uncertain intent-based standard, thereby effectively outlawing lawful, multifunction products.

6. **Myth:** The bill does not prevent the kind of activities approved by the Supreme Court in Sony v. Universal as noninfringing "fair uses."

Fact: H.R. 2281 has no rules governing when or how copy protection is applied. So, if technological protections are applied to broadcast or cable transmissions – in fact, the technology exists to do so today – H.R. 2281 would make it illegal to time-shift record the broadcasts for personal viewing at the consumer's convenience, as well as to manufacture a VCR capable of making that time-shift recording.

7. **Myth:** H.R. 2281 prohibits circumvention only in relation to a work that has been scrambled or encrypted.

Fact: While the "access" provisions of Section 1201(a) of the Administration's bill arguably relate only to encrypted works, this is uncertain, since there is no meaningful definition or limitation of "technological protection measures" or of "circumvention." Moreover, the "copy control" provisions of Section 1201(b), by their own terms, are not limited to situations in which the works themselves are unreadable by typical devices. Indeed, Section 1201(b) would apply to technological measures that work only on current product designs (rather than by inherently protecting the works themselves). The chilling consequence is that any redesign of an existing product or component, even for legitimate purposes of improving picture quality or device performance, may create liability under this provision where the redesign eliminates a feature exploited by the technological measure. This is, in fact, exactly the situation with an analog, non-encryption based video copy protection technology on the market today – a proprietary system of the Macrovision Corporation used on approximately half of the prerecorded videocassettes on the market today. Some current model VCRs and, to our knowledge, all analog inputs to computers do not respond to Macrovision's technology, however, and would be outlawed by this legislation.

8. **Myth:** The legislation outlaws only "black boxes" and not computer products and common consumer devices such as VCRs.

Fact: Confirming the extraordinarily broad reach of the bill, the Subcommittee specifically rejected an amendment that would have explicitly exempted VCRs and personal computers from the bill's draconian provisions. In fact, since the bill outlaws any device based on the function and "purpose" of a single component, the bill would make large numbers of current model VCRs and computer products illegal. For example, the Macrovision system described above uses a portion of the television signal known as the "vertical blanking interval," which routinely is disregarded or stripped by certain VCRs, video circuit boards for personal computers, and devices such as video titlers and special effects editors for home camcorder movies. If a manufacturer of these devices refuses to modify these circuits in its products, the copy control feature of the technology may not have its intended effect. Thus, under the Administration's bill, any manufacturer making these types of products, no matter what the reason, faces a serious risk of being sued.

9. **Myth:** Copyright owners need the Administration's bill to protect their works against theft.

Fact: Copyright owners have numerous legal means at their disposal to protect their works. Equally significantly, over the past few years, the consumer electronics, computer, and content industries have worked together on the development of truly effective technologies to protect content. For example:

- The new DVD technology allows movie companies to use one of two privately developed technologies to encrypt their works and, through conditions imposed through licenses for the decryption technologies, effectively require that any playback device protect against consumer copying of these works.
- In mid-February 1998, five companies in the computer and consumer electronics businesses announced creation of a new technology to protect content in digital transmissions between devices in the home. Assuming that this approach is adopted, it will pave the way for introduction of a wide range of digital video and audio devices employing truly effective copy control technology.
- In the context of the Internet and other electronic delivery mechanisms, new "watermark" technologies are being developed, and methods of ensuring the preservation of these marks and providing for their use in relation to copying by the average user are being actively explored by a variety of industry participants.

10. Myth: H.R. 2281 protects the fair use rights of libraries, schools, and consumers.

Fact: Since the legislation is aimed at circumvention without regard to infringement of copyright, the normal fair use defenses are not available to anyone alleged to have violated this legislation. Neither proposed Section 1201(d) nor any other parts of proposed Section 1201 provides for fair use to be applied as a defense to a charge of circumvention under Section 1201(a) or (b). Thus, an individual can be held criminally liable for circumventing copy control measures under this legislation even if that individual had a right to the materials under the fair use doctrine.

11. Myth: Fears of lawsuits are overblown. No "legitimate" companies will be sued for their ordinary activities.

Fact: History is, unfortunately, otherwise

- Although the VCR has now become a tremendous money-generating technology for the movie industry, that industry fought its introduction in bitter court and legislative efforts throughout the late 1970s and early 1980s. Only after Sony won its case in the Supreme Court in 1984 did Hollywood fully embrace this new technology and realize its economic gains as a result.
- Similarly, in the late 1980s, the recording industry fought the introduction of digital audio recording technology. Again, a major lawsuit was filed, which was settled in the context of the passage of the 1992 Audio Home Recording Act.

In both situations, suits threatened every major consumer electronics company and many retailers. The current concern about lawsuits involving major, well-known and highly regarded companies is based on this past experience.

12. Myth: Nothing in H.R. 2281 will inhibit development of new technologies.

Fact: The severe criminal and civil penalties contained in H.R. 2281 will force legitimate developers of computer technologies and consumer electronics products to scrutinize every design change and innovation so as to avoid claims that they have developed or sold technologies and products in violation of the prohibitions in this legislation. Even careful companies will likely face suits filed simply as “fishing expeditions” for internal engineering notes commenting on ancillary effects of new technologies. Many companies will be forced to limit technological development activities to only “safe” areas. Consumers will, as a result, be denied lawful enhancements of products on the basis that such features might circumvent a copy control measure.

13. Myth: The Administration’s bill will stop technologies that allow circumvention of copyright protection measures from being developed.

Fact: The bill will only stop legitimate manufacturers who have a strong interest in abiding by the law from developing these products. Unfortunately, if the market exists for illegal copies of copyrighted works, there are plenty of unscrupulous people with enough technological sophistication to develop circumvention technology. Ironically, the prohibition against developing these technologies could stifle a manufacturer’s ability to develop even stronger anti-circumvention technologies.

14. Myth: H.R. 2281 will not prevent small software companies from developing programs that work with, and compete against, de facto standard software operating systems and application programs.

Fact: A small software company interested in designing software that is compatible or could compete with the current de facto standard operating system must be able to look at the operating system’s “source code” to achieve compatibility, as well as to assess its weaknesses or flaws. Since the bill aims at circumvention without regard to whether the activity infringes any copyrights, it will allow the companies owning the de facto standard programs to use technological protections to thwart the legitimate design research by small software companies, thus stifling both innovation and competition.

15. Myth: Teachers are teaching our children to steal through the classroom use of computer and Internet-oriented technologies.

Fact: This is an insult to dedicated teachers and community-based school administrators. At a time when virtually every proposal on improving our children’s education stresses the critical role of technology in the classroom, this legislation would effectively send our children back to the blackboard and paper-based texts – a result the content community seems to anticipate in its January 24 advertisement in Congressional Quarterly, entitled “Teaching your kids to steal?”

- 16. Myth:** In the digital age, unrestricted fair use is equivalent to allowing people to break into a locked book store in order to exercise their fair use rights.

Fact: Fair use does not authorize stealing. In fact, it is a very narrowly drawn doctrine defining circumstances in which socially beneficiary uses of a work or a portion of a work should be permitted – even over the objection of the copyright owner. The proper analogy is that the Administration's legislation is equivalent to giving the content provider the keys to the public library and allowing the content provider to charge every time someone looks at or checks out a book from the library.

- 17. Myth:** The bill will have no effect on public domain or non-copyrighted information.

Fact: Nothing in the bill prohibits the use of the same technological protection measures that protect copyrighted works from being used to protect public domain or non-copyrighted material. In those circumstances, it would still be unlawful to manufacture or use the circumvention devices necessary to access the copy protected public domain and non-copyrighted information. Moreover, copyrighted works such as computer software often incorporate non-copyrightable material. While courts repeatedly have recognized that this material may freely be accessed, copied, and used by competitors to develop competing and innovative new products, H.R. 2281 would make it impossible to develop or buy products that make possible access and use of such material.

- 18. Myth:** H.R. 2281 has precedent in the Audio Home Recording Act of 1992 (AHRA) and in prohibitions against cable and satellite descramblers, contained in the Communications Act.

Fact: Past legislation narrowly addressed particular anticircumvention problems, specific types of copyrighted works, and defined technological protection measures, thus giving advance notice to device manufacturers of what systems were being protected by law. The AHRA, moreover, secured consumers' rights to make analog copies and one generation of digital copies of copy protected sound recordings. H.R. 2281 takes a vastly different – and unprecedented – approach, addressing circumvention of any and all technological protection measures with respect to all types of copyrighted works, without any protections for consumers, device manufacturers, or the public interest.

March 10, 1998

R. B. R. J.

H.R. 3048

IN THE HOUSE OF REPRESENTATIVES

Mr. Boucher (for himself and Mr. Campbell of California) introduced the following bill; which was referred to the Committee on _____.

A BILL

To update and preserve balance in the Copyright Act for the 21st Century; to advance educational opportunities through distance learning; to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty; and for other purposes.

1 *Be it enacted by the Senate and House of Representatives of*
2 *the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Digital Era Copyright
5 Enhancement Act".

1 SEC. 2. FAIR USE.

2 (a) TRANSMISSIONS.--The first sentence of section 107 of
3 title 17, United States Code, is amended by inserting after "or by any
4 other means specified in that section," the following: "and by analog
5 or digital transmission,"; and

6 (b) DETERMINATION.--Section 107 of title 17, United States
7 Code, is amended by adding at the end thereof the following:

8 "In making a determination concerning fair use, no independent
9 weight shall be afforded to--

10 "(1) the means by which the work has been performed,
11 displayed or distributed under the authority of the copyright owner;
12 or

13 "(2) the application of an effective technological measure (as
14 defined under section 1201(c)) to the work."

15 SEC. 3. LIBRARY/ARCHIVE EXEMPTIONS.

16 Section 108 of title 17, United States Code, is amended--

17 (1) by striking "Notwithstanding" at the beginning of
18 subsection (a) and inserting: "Except as otherwise provided and
19 notwithstanding";

20 (2) by inserting after "copyright" in subsection (a)(3): "if
21 such notice appears on the copy or phonorecord that is
22 reproduced under the provisions of this section";

23 (3) in subsection (b) by--

24 (A) deleting "a copy or phonorecord" and inserting in
25 lieu thereof: "three copies or phonorecords"; and

26 (B) deleting "in facsimile form"; and

1 (4) in subsection (c) by--

2 (A) deleting "a copy or phonorecord" and inserting in
3 lieu thereof: "three copies or phonorecords";

4 (B) deleting "in facsimile form"; and

5 (C) inserting "or if the existing format in which the
6 work is stored has become obsolete," after "stolen,".

7 **SEC. 4. FIRST SALE .**

8 Section 109 of title 17, United States Code, is amended by
9 adding the following new subsection at the end thereof:

10 "(f) The authorization for use set forth in subsection (a) applies
11 where the owner of a particular copy or phonorecord in a digital
12 format lawfully made under this title, or any person authorized by
13 such owner, performs, displays or distributes the work by means of
14 transmission to a single recipient, if that person erases or destroys his
15 or her copy or phonorecord at substantially the same time. The
16 reproduction of the work, to the extent necessary for such
17 performance, display, or distribution, is not an infringement."

18 **SEC. 5. DISTANCE LEARNING.**

19 (a) **TITLE CHANGE.**--The title of section 110 of title 17,
20 United States Code, is amended to read as follows:

21 "§ 110. Limitations on exclusive rights: Exemption of certain
22 activities";

23 (b) **PERFORMANCE, DISPLAY AND DISTRIBUTION OF A**
24 **WORK.**--Section 110(2) of title 17, United States Code, is amended
25 to read as follows:

1 "(b) Notwithstanding the provisions of section 106, it is not an
2 infringement to make a copy of a work in a digital format if such
3 copying--

4 "(1) is incidental to the operation of a device in the course
5 of the use of a work otherwise lawful under this title; and

6 "(2) does not conflict with the normal exploitation of the
7 work and does not unreasonably prejudice the legitimate
8 interests of the author."

9 **SEC. 7. PREEMPTION.**

10 Section 301(a) of title 17, United States Code, is amended by
11 inserting the following at the end thereof:

12 "When a work is distributed to the public subject to non-negotiable
13 license terms, such terms shall not be enforceable under the common
14 law or statutes of any state to the extent that they--

15 "(1) limit the reproduction, adaptation, distribution,
16 performance, or display, by means of transmission or otherwise, of
17 material that is uncopyrightable under section 102(b) or otherwise; or

18 "(2) abrogate or restrict the limitations on exclusive rights
19 specified in sections 107 through 114 and sections 117 and 118 of
20 this title."

21 **SEC. 8. COPYRIGHT PROTECTION AND MANAGEMENT**
22 **SYSTEMS.**

23 Title 17, United States Code, is amended by adding at the end
24 the following new chapter:

1 "CHAPTER 12--COPYRIGHT PROTECTION AND
2 MANAGEMENT SYSTEMS

- 3 "Sec.
4 "1201. Circumvention of certain technological measures.
5 "1202. Integrity of copyright management information.
6 "1203. Civil Remedies.

7 "§ 1201. Circumvention of certain technological measures

8 "(a) CIRCUMVENTION CONDUCT.--No person, for the
9 purpose of facilitating or engaging in an act of infringement, shall
10 engage in conduct so as knowingly to remove, deactivate or
11 otherwise circumvent the application or operation of any effective
12 technological measure used by a copyright owner to preclude or limit
13 reproduction of a work or a portion thereof. As used in this
14 subsection, the term 'conduct' does not include manufacturing,
15 importing or distributing a device or a computer program.

16 "(b) CONDUCT GOVERNED BY SEPARATE
17 CHAPTER--Notwithstanding subsection (a), this section shall not
18 apply with respect to conduct or the offer or performance of a service
19 governed by a separate chapter of this title.

20 "(c) DEFINITION OF EFFECTIVE TECHNOLOGICAL
21 MEASURE.--As used in this section, the term 'effective
22 technological measure' means a change in the data comprising a
23 work or a copy of a work transmitted in digital format so as to
24 protect the rights of a copyright owner of such work or portion
25 thereof under this title and which--

26 "(1) encrypts or scrambles the work or a portion thereof in
27 the absence of information supplied by the copyright owner; or

1 "(2) includes attributes with respect to access or recording
2 status that cannot be removed without degrading the work or a
3 portion thereof.

4 "**§ 1202. Integrity of copyright management information**

5 "**(a) FALSE COPYRIGHT MANAGEMENT**
6 **INFORMATION.--**No person shall knowingly provide copyright
7 management information that is false, or knowingly publicly
8 distribute or import for distribution copyright management
9 information that is false, with intent to induce, facilitate, or conceal
10 infringement.

11 "**(b) REMOVAL OR ALTERATION OF COPYRIGHT**
12 **MANAGEMENT INFORMATION.--**No person shall, without
13 authority of the copyright owner or other lawful authority,
14 knowingly and with intent to mislead or to induce or facilitate
15 infringement--

16 "(1) remove or alter any copyright management
17 information;

18 "(2) publicly distribute or import for distribution a copy or
19 phonorecord containing copyright management information that
20 has been altered without authority of the copyright owner or
21 other lawful authority; or

22 "(3) publicly distribute or import for distribution a copy or
23 phonorecord from which copyright management information has
24 been removed without authority of the copyright owner or other
25 lawful authority:

26 *Provided*, That the conduct governed by this subsection does not
27 include the manufacturing, importing or distributing of a device.

1 "(c) DEFINITION OF COPYRIGHT MANAGEMENT
2 INFORMATION.--As used in this chapter, the term 'copyright
3 management information' means the following information in
4 electronic form as carried in or as data accompanying a copy or
5 phonorecord of a work , including in digital form:

6 "(1) The title and other information identifying the work,
7 including the information set forth in a notice of copyright;

8 "(2) The name and other identifying information of the
9 author of the work;

10 "(3) The name and other identifying information of the
11 copyright owner of the work, including the information set forth
12 in a notice of copyright;

13 "(4) Terms and conditions for uses of the work;

14 "(5) Identifying numbers or symbols referring to such
15 information or links to such information; and

16 "(6) Such other identifying information concerning the
17 work as the Register of Copyrights may prescribe by regulation:

18 *Provided*, That the term 'copyright management information' does
19 not include the information described in section 1002, section
20 1201(c), or a chapter of this title other than chapters one through nine
21 of this title: *Provided further*, That, in order to assure privacy
22 protection, the term "copyright management information" does not
23 include any personally identifiable information relating to the user of
24 a work, including but not limited to the name, account, address or
25 other contact information of or pertaining to the user.

1 "§ 1203. Civil remedies

2 "(a) CIVIL ACTIONS.--Any person aggrieved by a violation of
3 section 1201(a) or 1202 may bring a civil action in an appropriate
4 United States district court against any person for such violation.

5 "(b) POWERS OF THE COURT.--In an action brought under
6 subsection (a), the court--

7 "(1) may grant a temporary and a permanent injunction on
8 such terms as it deems reasonable to prevent or restrain a
9 violation;

10 "(2) may grant such other equitable relief as it deems
11 appropriate;

12 "(3) may award damages pursuant to subsection (c);

13 "(4) may allow the recovery of costs by or against any
14 party other than the United States or an officer thereof; and

15 "(5) may award a reasonable attorney's fee to the
16 prevailing party.

17 "(c) AWARD OF DAMAGES.--

18 "(1) IN GENERAL.--If the court finds that a violation of
19 section 1201(a) or 1202 has occurred, the complaining party
20 may elect either actual damages as computed under paragraph
21 (2) or statutory damages as computed under paragraph (3).

22 "(2) ACTUAL DAMAGES.--The court may award to the
23 complaining party the actual damages suffered by him or her as
24 a result of the violation, and any profits of the violator that are
25 attributable to the violation and are not taken into account in
26 computing the actual damages, if the complaining party elects

1 such damages instead of statutory damages at any time before
2 final judgment is entered.

3 "(3) STATUTORY DAMAGES.--(A) The court may
4 award to the complaining party statutory damages for each
5 violation of section 1201(a) of not less than \$250 or more than
6 \$2,500, as the court considers just, if the complaining party
7 elects such damages instead of actual damages at any time
8 before final judgment is entered.

9 "(B) The court may award to the complaining party
10 statutory damages for each violation of section 1202 of not less
11 than \$500 or more than \$20,000, as the court considers just, if
12 the complaining party elects such damages instead of actual
13 damages at any time before final judgment is entered.

14 "(4) REPEATED VIOLATIONS.--In any case in which
15 the court finds that a person has violated section 1201(a) or 1202
16 within three years after a final judgment against that person for
17 another such violation was entered, the court may increase the
18 award of damages to not more than double the amount that
19 would otherwise be awarded under paragraph (2) or (3), as the
20 court considers just.

21 "(5) INNOCENT VIOLATION.--The court may reduce or
22 remit altogether the total award of damages that otherwise would
23 be awarded under paragraph (2) or (3) in any case in which the
24 violator sustains the burden of proving, and the court finds, that
25 the violator was not aware and had no reason to believe that its
26 acts constituted a violation of section 1201(a) or 1202."

1 **Sec. 9. CONFORMING AMENDMENTS.**

2 (a) **TABLE OF SECTIONS.**--The table of sections for chapter 1
3 of title 17, United States Code, is amended by--

4 (1) Revising the item relating to section 110 to read as
5 follows:

6 "110. Limitations on exclusive rights: Exemption of certain activities"; and

7 (2) Revising the item relating to section 117 to read as
8 follows:

9 "117. Limitations on exclusive rights: Computer programs and digital copies".

10 (b) **TABLE OF CHAPTERS.**--The table of chapters for title 17,
11 United States Code, is amended by adding at the end the following:

12 "12. Copyright Protection and Management Systems 1201".

13 **Sec. 10. EFFECTIVE DATES.**

14 (a) **IN GENERAL.**--Sections one through seven and section
15 9(a) of this Act, and the amendments made by sections one through
16 seven and section 9(a) of this Act, shall take effect on the date of
17 enactment of this Act.

18 (b) **WIPO TREATIES.**--Section 8 and section 9(b) of this Act,
19 and the amendments made by section 8 and section 9(b) of this Act,
20 shall take effect on the date on which both the World Intellectual
21 Property Organization Copyright Treaty and the World Intellectual
22 Property Organization Performances and Phonograms Treaty have
23 entered into force with respect to the United States.