II

105TH CONGRESS
1ST SESSION

S. 1146

To amend title 17, United States Code, to provide limitations on copyright liability relating to material on-line, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 3, 1997

Mr. ASHCROFT introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, to provide limitations on copyright liability relating to material on-line, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Digital Copyright Clarification and Technology Education Act of 1997''.

TITLE 1—DIGITAL COPYRIGHT CLARIFICATION

SEC. 101. PURPOSES.

The purposes of this Act are—

(1) to clarify the application of copyright law in the unique environment of Internet and on-line communication;

(2) to foster the continued growth and development of the Internet as a means of communication and commerce, including the lawful distribution of intellectual property;

(3) to protect the rights of copyright owners in the digital environment;

(4) to clarify that providing network services and facilities with respect to the transmission of electronic communications of another person does not result in liability under the Copyright Act;

(5) to clarify that Internet and on-line service providers are not liable for third-party copyright infringements unless they have received notice in compliance with this Act of the infringing material and have a reasonable opportunity to limit the third-party infringement; and

(6) to create incentives for the rapid elimination of infringing material residing on an electronic communications system or network without litigation.

SEC. 102. CLARIFICATION OF LIABILITY.

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

"§ 512. Liability relating to material on the Internet and on-line

''(a) MATERIAL BEING TRANSMITTED THROUGH AN ELECTRONIC COMMUNICATIONS SYSTEM OR NETWORK.—

''(1) NETWORK SERVICES WITH RESPECT TO THE TRANSMISSION OF ELECTRONIC COMMUNICATIONS.—A person shall not be liable for direct, vicarious or contributory infringement of copyright arising out of providing electronic communications network services or facilities with respect to a copyright infringement by a user. A person shall be considered to provide ''network services and facilities'' when such person transmits, routes or provides connections for material on behalf of a user over an electronic communications system or network controlled or operated by or for the person, including intermediate and transient storage, the processing of information, and the provision of facilities therefor, if—

''(A) the provision of services is for the purpose of managing, controlling or operating a communications system or network, supplying

local access, local exchange, telephone toll, trunk line, private line, or backbone services, including network components or functions necessary to the transmission of material contained in electronic communications carried over those services; or

''(B) the transmission of material over the system or network on behalf of a user does not involve the generation or material alteration of content by the person.

''(2) PRIVATE AND REAL-TIME COMMUNICATION SERVICES.—A person shall not be liable for direct, vicarious or contributory infringement of copyright arising from supplying to another—

''(A) a private electronic communication, including voice messaging or electronic mail services, or any other communication for which such person lacks either the technical ability or authority under law to access or disclose such communication to any third party in the normal course of business; or

''(B) real-time communication formats, including chat rooms, streamed data, or other virtually simultaneous transmissions.

''(3) INFORMATION LOCATION TOOLS.—No person shall be liable for direct, vicarious or contributory infringement of copyright arising out of supplying a user of network services or facilities with—

''(A) a site-linking aid or directory, including a hyperlink or index;

''(B) a navigational aid, including a search engine or browser; or

''(C) the tools for the creation of a site-linking aid.

''(b) MATERIAL RESIDING ON A SYSTEM OR NETWORK.—

''(1) COOPERATIVE PROCEDURE FOR EXPEDITIOUS RESPONSE TO CLAIMS OF INFRINGEMENT.—A person shall not be liable for direct, vicarious or contributory infringement of copyright arising out of the violation of any of the exclusive rights of the copyright owner by another with respect to material residing on a system or network used in conjunction with electronic communications that is controlled or operated by or for the person, unless upon receiving notice complying with paragraph (b)(3), the person fails expeditiously to remove, disable, or block access to the material to the extent technologically feasible and economically reasonable for a period of ten days,

or until receiving a court order concerning the material, whichever is less.

''(2) Paragraph (b)(1) shall apply where such person—

''(A) did not initiate the placement of the material on the system or network;

''(B) did not determine the content of the material placed on the system of network; and

''(C) did not contract for placement of the specific material on the system or network by another person in order to provide that content as part of the person's service offering.

''(3) A person shall not be deemed to have notice that material residing on a system or network used in conjunction with electronic communications is infringing unless the person—

''(A) is in receipt of a notification that the particular material is infringing. Such notification shall:

''(i) pertain only to allegedly infringing material that resides on a system or network controlled or operated by or for the person;

''(ii) be submitted in accordance with directions displayed on the person's system

or network indicating a single place or person to which such notifications shall be submitted;

''(iii) be signed, physically or electronically, by an owner of an exclusive right that is allegedly infringed, or by a person authorized to act on such owner's behalf;

''(iv) provide an address, telephone number, and electronic mail address, if available, at which the complaining party may be contacted in a timely manner;

''(v) describe the material claimed to be infringing, including information reasonably sufficient to permit the person expeditiously to identify and locate the material;

''(vi) provide reasonable proof of a certificate of copyright registration for the material in question, a filed application for such registration, or a court order establishing that use of the material in the manner complained of is not authorized by the copyright owner or the law;

''(vii) contain a sworn statement that the information in the notice is accurate, that the complaining party is an owner of the exclusive right that is claimed to be infringed or otherwise has the authority to enforce the owner's rights under this title, and that the complaining party has a good faith belief that the use complained of is an infringement;

''(viii) be accompanied by any payment that the Register of Copyrights determines is necessary to deter frivolous and de minimis notices; and

''(B) A person who is an employee or agent of a nonprofit educational institution, library or archives, acting within the scope of his employment, or such an educational institution, library or archives itself, shall not be deemed to have notice under subparagraph (A) if that person reasonably believed (i) that the allegedly infringing use was a fair use under Sec. 10 or (ii) was otherwise lawful; and

''(C) The Register of Copyrights may, by regulation, establish guidelines identifying additional information to be included in the notice

and shall issue a standard notice form in both electronic and hard copy formats, which complies with this paragraph, but failure of a party to provide any such additional information, or failure to use any issued form, shall not invalidate the notice.

''(4) MISREPRESENTATIONS AND REDRESS FOR WRONGFUL NOTIFICATIONS.—Any person who materially misrepresents that material on-line is infringing in a notice described in paragraph (b)(3)(A), shall be liable in a civil action that may be brought in an appropriate United States district court or State court for statutory damages of not less than $1,000, and any actual damages, including costs and attorneys' fees, incurred by—

''(A) the actual copyright owner or the alleged infringer arising out of the disabling or blocking of access to or removal of such material; or

''(B) any person who relies upon such misrepresentation in removing, disabling, or blocking access to the material claimed to be infringing in such notice.

''(5) LIMITATION ON LIABILITY BASED UPON REMOVING, DISABLING, OR BLOCKING ACCESS TO IN-

FRINGING MATERIAL.—A person shall not be liable for any claim based on that person's removing, disabling, or blocking access for a period of ten days, or until the person receives a court order concerning the material, whichever is less, to material residing on a system or network used in conjunction with electronic communications that is controlled or operated by or for that person in response to notice pursuant to paragraph (b)(3)(A) that the material is infringing, whether or not the material is infringing.

''(6) OTHER DEFENSES NOT AFFECTED.—A person's removing, disabling, or blocking access to material residing on a system or network used in conjunction with electronic communications that is controlled or operated by or for that person, pursuant to paragraph (1), or the failure to do so, shall not adversely bear upon the consideration by a court of any other issue pertaining to liability or remedy, including any other limitation on liability established in paragraph (a), any other applicable defense, any claim that the service provider's alleged conduct is not infringing, or whether or not such conduct is willful or innocent.''.

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

''512. Liability relating to material on the Internet and on-line.''.

TITLE II—TECHNOLOGY FOR TEACHERS AND LIBRARIANS

SEC. 201. SHORT TITLE.

This title may be cited as the ''Technology for Educators and Children (TECh) Act''.

SEC. 202. FAIR USE.

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

(b) DETERMINATION.—Section 107 of title 17, United States Code, is amended by adding at the end thereof the following: ''In making a determination concerning fair use, no independent weight shall be afforded to—

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

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

SEC. 203. LIBRARY EXEMPTIONS.

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

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

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

(3) in subsection (b) by—

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

(B) deleting ''in facsimile form''; and

(4) in subsection (c) by—

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

(B) deleting ''in facsimile form''; and

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

SEC. 204. DISTANCE EDUCATION.

(a) TITLE CHANGE.—The title of section 117 of title 17,

United States Code, is amended to read as follows:

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

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

''(2) performance, display or distribution of a work, by or in the course of an analog or digital transmission, if—

''(A) the performance, display or distribution is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution;

''(B) the performance, display or distribution is directly related and of material assistance to the teaching content of the transmission; and

''(C) the work is provided for reception by—

''(i) students officially enrolled in the course in connection with which it is provided; or

''(ii) officers or employees of governmental bodies as part of their official duties or employment;''

(c) EPHEMERAL RECORDINGS OF WORKS.—Section 112(b) of title 17, United States Code, is amended by deleting ''transmit a performance or display of'' and inserting in lieu thereof: ''perform, display or distribute''.

SEC. 205. LIMITATIONS ON EXCLUSIVE RIGHTS.

(a) TITLE.—The title of section 117 of title 17, United States Code, is amended to read as follows:

''§ 117. Limitations on exclusive rights: Computer programs and digital copies'';

(b) DIGITAL COPIES.—Section 117 of title 17, United States Code, is amended by inserting ''(a)'' before ''Notwithstanding'' and inserting the following as a new subsection (b):

''(b) Notwithstanding the provisions of section 106, it is not an infringement to make a copy of a work in a digital format if such copying—

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

''(2) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.''.

TITLE III—WIPO TREATY IMPLEMENTATION

SEC. 301. WIPO IMPLEMENTATION

Title 17 of the United States Code is amended by adding the following sections:

"§ 1201. Circumvention of certain technological measures

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

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

''(c) DEFINITION OF EFFECTIVE TECHNOLOGICAL MEASURE.—As used in this section, the term 'effective technological measure' means information included with or an attribute applied to a transmission or a copy of a work in a digital format, or a portion thereof, so as to protect

the rights of a copyright owner of such work or portion thereof under chapter one of this title and which—

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

''(2) includes attributes regarding access to or recording of the work that cannot be removed without degrading the work or a portion thereof.

''§ 1202. Integrity of copyright management information

''(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly provide copyright management information that is false, or knowingly publicly distribute or import for distribution copyright management information that is false, with intent to induce, facilitate, or conceal infringement.

''(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—No person shall, without authority of the copyright owner or other lawful authority, knowingly and with intent to mislead or to induce or facilitate infringement—

''(1) remove or alter any copyright management information;

''(2) publicly distribute or import for distribution a copy of phonorecord containing copyright

management information that has been altered without authority of the copyright owner or other lawful authority; or

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

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

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

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

''(2) The name and other identifying information of the author of the work;

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

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

''(5) Identifying numbers or symbols referring to such information or links to such information; and

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

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

"§ 1203. Civil remedies

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

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

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

''(2) may grant such other equitable relief as it deems appropriate;

''(3) may award damages pursuant to subsection (c);

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

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

''(c) AWARD OF DAMAGES.—

''(1) IN GENERAL.—If the court finds that a violation of section 1201(a) or 1202 has occurred, the complaining party may elect to either actual damages as computed under paragraph (2) or statutory damages as computed under paragraph (3).

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

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

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

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

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

''(5) INNOCENT VIOLATION.—The court may reduce or remit altogether the total award of damages

that otherwise would be awarded under paragraph (2) or (3) in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation of section 1201(a) or 1202.''.

SEC. 302. CONFORMING AMENDMENTS.

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

(1) revising the item relating to section 110 to read as follows:

''110. Limitations on exclusive rights: Exemption of certain activities.'';

and

(2) revising the item relating to section 117 to read as follows:

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

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

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

SEC. 303. EFFECTIVE DATES.

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

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

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