Calendar No. 358

105TH CONGRESS
2D SESSION

S. 2037

A BILL

To amend title 17, United States Code, to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, to provide limitations on copyright liability relating to material online, and for other purposes.

MAY 6, 1998

Read twice and placed on the calendar

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IN THE SENATE OF THE UNITED STATES

MAY 6, 1998

Mr. HATCH, from the Committee on the Judiciary, reported the following original bill; which was read twice and placed on the calendar

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A BILL

To amend title 17, United States Code, to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, to provide limitations on copyright liability relating to material online, and for other purposes.

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 Millennium Copyright Act of 1998''.

SEC. 2. TABLE OF CONTENTS.

Sec. 1. Short title.
Sec. 2. Table of contents.

TITLE I—WIPO TREATIES IMPLEMENTATION

Sec. 101. Short title.
Sec. 102. Technical amendments.
Sec. 103. Copyright protection systems and copyright management information.
Sec. 104. Conforming amendment.
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TITLE II—INTERNET COPYRIGHT INFRINGEMENT LIABILITY

Sec. 201. Short title.
Sec. 202. Limitations on liability for Internet copyright infringement.
Sec. 203. Conforming amendment.
Sec. 204. Liability of educational institutions for online infringement of copyright.
Sec. 205. Effective date.

TITLE III—COMPUTER MAINTENANCE OR REPAIR

Sec. 301. Limitation on exclusive rights; computer programs.

TITLE IV—DISTANCE EDUCATION; EXEMPTION FOR LIBRARIES AND ARCHIVES

Sec. 401. Ephemeral recordings.
Sec. 402. Limitations on exclusive rights; distance education.
Sec. 403. Exemption for libraries and archives.

TITLE I—WIPO TREATIES IMPLEMENTATION

SEC. 101. SHORT TITLE.

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

SEC. 102. TECHNICAL AMENDMENTS.

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

(1) by deleting the definition of ''Berne Convention work'';

(2) in the definition of ''The 'country of origin' of a Berne Convention work'', by deleting ''The 'country of origin' of a Berne Convention work,'', capitalizing the first letter of the word ''for'', deleting ''is the United States'' after ''For purposes of section 411,'', and inserting ''a work is a 'United States work' only'' after ''For purposes of section 411,'';

(3) in subsection (1)(B) of the definition of ''The 'country of origin' of a Berne Convention work'', by inserting ''treaty party or parties'' and deleting ''nation or nations adhering to the Berne Convention'';

(4) in subsection (1)(C) of the definition of ''The 'country of origin' of a Berne Convention work'', by inserting ''is not a treaty party'' and deleting ''does not adhere to the Berne Convention'';

(5) in subsection (1)(D) of the definition of ''The 'country of origin' of a Berne Convention work'', by inserting ''is not a treaty party'' and deleting ''does not adhere to the Berne Convention'';

(6) in section (3) of the definition of ''The 'country of origin' of a Berne Convention work'', by deleting ''For the purposes of section 411, the 'coun-

try of origin' of any other Berne Convention work is not the United States.'';

(7) after the definition for ''fixed'', by inserting ''The 'Geneva Phonograms Convention' is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland on October 29, 1971.'';

(8) after the definition for ''including'', by inserting ''An 'international agreement' is—

''(1) the Universal Copyright Convention;

''(2) the Geneva Phonograms Convention;

''(3) the Berne Convention;

''(4) the WTO Agreement;

''(5) the WIPO Copyright Treaty;

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

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

(9) after the definition for ''transmit'', by inserting ''A 'treaty party' is a country or intergovernmental organization other than the United States that is a party to an international agreement.'';

(10) after the definition for ''widow'', by inserting ''The 'WIPO Copyright Treaty' is the WIPO

Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.'';

(11) after the definition for ''The 'WIPO Copyright Treaty', by inserting ''The 'WIPO Performances and Phonograms Treaty' is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland on December 20, 1996.''; and

(12) by inserting, after the definition for ''work for hire'', ''The 'WTO Agreement' is the Agreement Establishing the World Trade Organization entered into on April 15, 1994. The terms 'WTO Agreement' and 'WTO member country' have the meanings given those terms in paragraphs (9) and (10) respectively of section 2 of the Uruguay Round Agreements Act.''.

(b) Section 104 of title 17, United States Code, is amended—

(1) in section (b)(1), by deleting ''foreign nation that is a party to a copyright treaty to which the United States is also a party'' and inserting ''treaty party'';

(2) in section (b)(2) by deleting ''party to the Universal Copyright Convention'' and inserting ''treaty party'';

(3) by renumbering the present section (b)(3) as (b)(5) and moving it to its proper sequential location and inserting a new section (b)(3) to read:

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

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

(5) by renumbering present section (b)(5) as (b)(6);

(6) by inserting a new section (b)(7) to read:

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

(7) by inserting a new section (d) to read:

''(d) EFFECT OF PHONOGRAMS TREATIES.—Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the

United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.''.

(c) Section 104A(h) of title 17, United States Code, is amended—

(1) in paragraph (1), by deleting ''(A) a nation adhering to the Berne Convention or a WTO member country; or (B) subject to a Presidential proclamation under subsection (g),'' and inserting—

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

''(B) a WTO member country;

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

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

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

(2) paragraph (3) is amended to read as follows:

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

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

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

''(C) adheres to the WIPO Copyright Treaty;

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

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

(3) in paragraph (6)(C)(iii), by deleting ''and'' after ''eligibility'';

(4) at the end of paragraph (6)(D), by deleting the period and inserting ''; and'';

(5) by adding the following new paragraph (6)(E):

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

(6) in paragraph (8)(B)(i), by inserting ''of which'' before ''the majority'' and striking ''of eligible countries''; and

(7) by deleting paragraph (9).

(d) Section 411 of title 17, United States Code, is amended—

(1) in subsection (a), by deleting ''actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and''; and

(2) in subsection (a), by inserting ''United States'' after ''no action for infringement of the copyright in any''.

(e) Section 507(a) of title 17, United States Code, is amended by adding at the beginning, ''Except as expressly provided elsewhere in this title,''.

SEC. 103. COPYRIGHT PROTECTION SYSTEMS AND COPYRIGHT MANAGEMENT INFORMATION.

Title 17, United States Code, is amended by adding the following new chapter:

''CHAPTER 12—COPYRIGHT PROTECTION AND MANAGEMENT SYSTEMS

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

''§ 1201. Circumvention of copyright protection systems

''(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL PROTECTION MEASURES.—(1) No per-

son shall circumvent a technological protection measure that effectively controls access to a work protected under this title.

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

''(A) is primarily designed or produced for the purpose of circumventing a technological protection measure that effectively controls access to a work protected under this title;

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

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

''(3) As used in this subsection—

''(A) to 'circumvent a technological protection measure' means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological

protection measure, without the authority of the copyright owner; and

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

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

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

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

''(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection af-

forded by a technological protection measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

''(2) As used in this subsection—

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

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

''(c) IMPORTATION.—The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee of any technology, product, service, device, component, or part thereof as described in subsection (a) or (b) shall be actionable under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).

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

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

''(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological protection measure, so long as such part or component or the product, in which such part or component is integrated, does not otherwise fall within the prohibitions of subsections (a)(2) or (b)(1).

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

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

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

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

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

''(A) shall, for the first offense, be subject to the civil remedies under section 1203; and

''(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203, forfeit the exemption provided under paragraph (1).

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

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

''(A) open to the public; or

''(B) available not only to researchers affiliated with the library or archives or with the institution

of which it is a part, but also to other persons doing research in a specialized field.

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

''(g) Notwithstanding the provisions of subsection 1201(a)(1), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological protection measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

''(h) Notwithstanding the provisions of subsections 1201(a)(2) and (b), a person may develop and employ technological means to circumvent for the identification and analysis described in subsection (g), or for the limited purpose of achieving interoperability of an independently

created computer program with other programs, where such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

''(i) The information acquired through the acts permitted under subsection (g), and the means permitted under subsection (h), may be made available to others if the person referred to in subsections (g) or (h) provides such information or means solely for the purpose of achieving interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title, or violate applicable law other than this title.

''(j) For purposes of subsections (g), (h) and (i), the term ''interoperability'' means the ability of computer programs to exchange information, and for such programs mutually to use the information which has been exchanged.

''(k) In applying subsection (a) to a component or part, the court may consider the necessity for its intended and actual incorporation in a technology, product, service or device, which (i) does not itself violate the provisions of this chapter and (ii) has the sole purpose to prevent the access of minors to material on the Internet.''

"§ 1202. Integrity of copyright management information

''(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly—

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

''(2) distribute or import for distribution copyright management information that is false, with the intent to induce, enable, facilitate or conceal infringement.

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

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

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

''(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or, with respect to civil remedies under section 1203,

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

''(c) DEFINITION.—As used in this chapter, 'copyright management information' means the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form—

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

''(2) the name of, and other identifying information about, the author of a work;

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

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

''(5) with the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and

other identifying information about, a writer, performer, or director who is credited in the audiovisual work;

''(6) identifying numbers of symbols referring to such information or links to such information; or

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

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

''(e) LIMITATIONS ON LIABILITY.—

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

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

''(B) such person did not intend, by engaging in such activity, to induce, enable, facilitate or conceal infringement.

''(2) DIGITAL TRANSMISSIONS.—

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

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

''(ii) the activity that constitutes such violation is not intended to induce, enable, facilitate or conceal infringement.

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

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

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

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

''(II) an applicable industry-wide standard relating to the transmission

of information in a digital signal that was adopted by a voluntary consensus standards body prior to the effective date of this section; or

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

''§ 1203. Civil remedies

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

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

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

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

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

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

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

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

''(c) AWARD OF DAMAGES.—

''(1) IN GENERAL.—Except as otherwise provided in this chapter, a person committing a violation of section 1201 or 1202 is liable for either—

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

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

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

''(3) STATUTORY DAMAGES.—

''(A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than $200 or more than $2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.

''(B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than $2,500 or more than $25,000.

''(4) REPEATED VIOLATIONS.—In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within three years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

''(5) INNOCENT VIOLATIONS.—

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

''(B) NONPROFIT LIBRARY, ARCHIVES, OR EDUCATIONAL INSTITUTIONS.—In the case of a nonprofit library, archives, or educational institution, the court shall remit damages in any case in which the library, archives, or educational institution sustains the burden of proving, and the court finds, that the library, archives, or educational institution was not aware

and had no reason to believe that its acts constituted a violation.

"§ 1204. Criminal offenses and penalties

''(a) IN GENERAL.—Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain—

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

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

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

''(c) STATUTE OF LIMITATIONS.—Notwithstanding section 507(a) of this title, no criminal proceeding shall be brought under this section unless such proceeding is commenced within five years after the cause of action arose.''.

"§ 1205. Savings Clause

''Nothing in this chapter abrogates, diminishes or weakens the provisions of, nor provides any defense or element of mitigation in a criminal prosecution or civil action

under, any federal or state law that prevents the violation of the privacy of an individual in connection with the individual's use of the Internet.''.

SEC. 104. CONFORMING AMENDMENT.

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. 105. EFFECTIVE DATE.

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

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

(A) paragraph (5) of the definition of ''international agreement'' contained in section 101 of title 17, United States Code, as amended by section 102(a)(8) of this title.

(B) the amendment made by section 102(a)(10) of this title;

(C) subparagraph (C) of section 104A(h)(1) of title 17, United States Code, as amended by section 102(c)(1) of this title; and

(D) subparagraph (C) of section 104A(h)(3) of title 17, United States Code, as amended by section 102(c)(2) of this title.

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

(A) paragraph (6) of the definition of ''international agreement'' contained in section 101 of title 17, United States Code, as amended by section 102(a)(8) of this title.

(B) the amendment made by section 102(a)(11) of this title;

(C) the amendment made by section 102(b)(7) of this title;

(D) Subparagraph (D) of section 104A(h)(1) of title 17, United States Code, as amended by section 102(c)(2) of this title; and

(E) the amendment made by section 102(c)(4) of this title; and

(F) the amendment made by section 102(c)(5) of this title.

TITLE II—INTERNET COPYRIGHT INFRINGEMENT LIABILITY

SEC. 201. SHORT TITLE.

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

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

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

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

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

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

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

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

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

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

''(b) SYSTEM CACHING.—A service provider shall not be liable for monetary relief, or except as provided in subsection (i) for injunctive or other equitable relief, for infringement for the intermediate and temporary storage of material on the system or network controlled or operated by or for the service provider, where (i) such material is made available online by a person other than such service provider, (ii) such material is transmitted from the person described in clause (i) through such system or network

to someone other than that person at the direction of such other person, and (iii) the storage is carried out through an automatic technical process for the purpose of making such material available to users of such system or network who subsequently request access to that material from the person described in clause (i), provided that:

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

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

''(3) such service provider does not interfere with the ability of technology associated with such material that returns to the person described in clause (i) the information that would have been available to such person if such material had been

obtained by such subsequent users directly from such person, provided that such technology—

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

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

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

"(4) either—

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

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

been so authorized and only in accordance with those conditions; and

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

''(c) INFORMATION STORED ON SERVICE PROVIDERS.—

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

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

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

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

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

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

"(2) DESIGNATED AGENT.—The limitations on liability established in this subsection apply only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by substantially making the name, address, phone number, electronic mail address of

such agent, and other contact information deemed appropriate by the Register of Copyrights, available through its service, including on its website, and by providing such information to the Copyright Office. The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats.

''(3) ELEMENTS OF NOTIFICATION.—

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

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

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

''(iii) identification of the material that is claimed to be infringing or to be

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

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

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

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

''(B) A notification from the copyright owner or from a person authorized to act on behalf of the copyright owner that fails substantially to conform to the provisions of paragraph

(3)(A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent, provided that the provider promptly attempts to contact the complaining party or takes other reasonable steps to assist in the receipt of notice under paragraph (3)(A) when the notice is provided to the service provider's designated agent and substantially satisfies the provisions of subparagraphs (3)(A)(ii), (iii), and (iv).

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

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

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

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

''(e) MISREPRESENTATIONS.—Any person who knowingly materially misrepresents under this section (1) that material or activity is infringing, or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by the service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be

infringing, or in replacing the removed material or ceasing to disable access to it.

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

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

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

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

''(B) upon receipt of a counter notice as described in paragraph (3), promptly provides

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

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

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

''(A) a physical or electronic signature of the subscriber;

''(B) identification of the material that has been removed or to which access has been disabled and the location at which such material

appeared before it was removed or access was disabled;

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

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

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

"(g) IDENTIFICATION OF DIRECT INFRINGER.—The copyright owner or a person authorized to act on the own-

er's behalf may request an order for release of identification of an alleged infringer by filing (i) a copy of a notification described in subsection (c)(3)(A), including a proposed order, and (ii) a sworn declaration that the purpose of the order is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of this title, with the clerk of any United States district court. The order shall authorize and order the service provider receiving the notification to disclose expeditiously to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged direct infringer of the material described in the notification to the extent such information is available to the service provider. The order shall be expeditiously issued if the accompanying notification satisfies the provisions of subsection (c)(3)(A) and the accompanying declaration is properly executed. Upon receipt of the order, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), a service provider shall expeditiously give to the copyright owner or person authorized by the copyright owner the information required by the order, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

''(h) CONDITIONS FOR ELIGIBILITY.—

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

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

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

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

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

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

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

''(i) INJUNCTIONS.—The following rules shall apply in the case of any application for an injunction under sec-

tion 502 against a service provider that is not subject to monetary remedies by operation of this section:

''(1) SCOPE OF RELIEF.—

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

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

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

''(iii) such other injunctive remedies as the court may consider necessary to prevent or restrain infringement of specified copyrighted material at a particular online location, provided that such remedies are the least burdensome to the service pro-

vider that are comparably effective for that purpose.

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

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

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

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

''(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly bur-

den either the provider or the operation of the provider's system or network;

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

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

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

''(3) NOTICE AND EX PARTE ORDERS.—Injunctive relief under this subsection shall not be available without notice to the service provider and an opportunity for such provider to appear, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

''(j) DEFINITIONS.—

''(1)(A) As used in subsection (a), the term ''service provider'' means an entity offering the

transmission, routing or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.

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

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

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

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

''(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing ac-

tivity except to the extent consistent with a standard technical measure complying with the provisions of subsection (h); or

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

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

SEC. 203. CONFORMING AMENDMENT.

The table of sections for chapter 5 of title 17, United States Code, is amended by adding at the end the following:

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

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

(a) Not later than six months after the date of enactment of this Act, the Register of Copyrights, after consultation with representatives of copyright owners and nonprofit educational institutions, shall submit to the Con-

gress recommendations regarding the liability of nonprofit educational institutions for copyright infringement committed with the use of computer systems for which such an institution is a service provider, as that term is defined in 17 U.S.C. § 512 (as amended by this Act), including recommendations for legislation the Register of Copyrights considers appropriate regarding such liability, if any.

(b) In formulating recommendations, the Register of Copyrights shall consider, where relevant—

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

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

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

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

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

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

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

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

(9) the tradition of academic freedom; and

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

SEC. 205. EFFECTIVE DATE.

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

TITLE III—COMPUTER MAINTENANCE OR REPAIR

SEC. 301. LIMITATION ON EXCLUSIVE RIGHTS; COMPUTER PROGRAMS.

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

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

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

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

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

(3) by adding at the end the following new subsections:

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

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

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

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

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

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

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

SEC. 401. EPHEMERAL RECORDINGS.

Section 112 of title 17, United States Code is amended by—

(1) redesignating section 112(a) as 112(a)(1), and renumbering sections 112(a)(1), (2) and (3) as sections 112(a)(1)(A), (B) and (C), respectively;

(2) in section 112(a)(1), after the reference to section 114(a), add the words ''or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission that broadcasts a performance of a sound recording in a digital format on a non-subscription basis,'';

(3) adding new section 112(a)(2) as follows:

''Where a transmitting organization entitled to make a copy or phonorecord under section 112(a)(1) in connection with the transmission to the public of a performance or display of a work pursuant to that section is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, such copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord within the meaning of that section, provided that it is technologically feasible and economically reasonable for the copyright owner to do so, and provided further that, if such copyright owner fails to do so in a timely manner in light of the transmitting organi-

zation's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under section 112(a)(1).''.

SEC. 402. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE EDUCATION.

(a) Not later than six months after the date of enactment of this Act, the Register of Copyrights, after consultation with representatives of copyright owners, nonprofit educational institutions and nonprofit libraries and archives, shall submit to the Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users. Such recommendations shall include any legislation the Register of Copyrights considers appropriate to achieve the foregoing objective.

(b) In formulating recommendations, the Register of Copyrights shall consider—

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

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

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

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

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

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

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

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

SEC. 403. EXEMPTION FOR LIBRARIES AND ARCHIVES.

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

(1) in subsection (a) by—

(A) striking ''Notwithstanding'' and inserting ''Except as otherwise provided and notwithstanding'';

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

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

(2) in subsection (b) by—

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

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

(C) striking ''if the copy or phonorecord reproduced is currently in the collections of the

library or archives.'' and inserting in lieu thereof ``if—

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

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

(3) in subsection (c) by—

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

(B) striking ``in facsimile form'';

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

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

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

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

(E) adding at the end the following: ''For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.''.