

DIGITAL MILLENNIUM COPYRIGHT ACT

OCTOBER 8, 1998.—Ordered to be printed

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

CONFERENCE REPORT

[To accompany H.R. 2281]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2281), to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

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

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

SECTION 1. SHORT TITLE.

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

SEC. 2. TABLE OF CONTENTS.

Sec. 1. Short title.

Sec. 2. Table of contents.

TITLE I—WIPO TREATIES IMPLEMENTATION

Sec. 101. Short title.

Sec. 102. Technical amendments.

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

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

Sec. 105. Effective date.

TITLE II—ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

Sec. 201. Short title.

Sec. 202. Limitations on liability for copyright infringement.

Sec. 203. Effective date.

TITLE III—COMPUTER MAINTENANCE OR REPAIR COPYRIGHT EXEMPTION

Sec. 301. Short title.

Sec. 302. Limitations on exclusive rights; computer programs.

TITLE IV—MISCELLANEOUS PROVISIONS

Sec. 401. Provisions Relating to the Commissioner of Patents and Trademarks and the Register of Copyrights.

Sec. 402. Ephemeral recordings.

Sec. 403. Limitations on exclusive rights; distance education.

Sec. 404. Exemption for libraries and archives.

Sec. 405. Scope of exclusive rights in sound recordings; ephemeral recordings.

Sec. 406. Assumption of contractual obligations related to transfers of rights in motion pictures.

Sec. 407. Effective date.

TITLE V—PROTECTION OF CERTAIN ORIGINAL DESIGNS

Sec. 501. Short title.

Sec. 502. Protection of certain original designs.

Sec. 503. Conforming amendments.

Sec. 504. Joint study of the effect of this title.

Sec. 505. Effective date.

TITLE I—WIPO TREATIES IMPLEMENTATION

“(1) the Universal Copyright Convention;

“(2) the Geneva Phonograms Convention;

“(3) the Berne Convention;

“(4) the WTO Agreement;

“(5) the WIPO Copyright Treaty;

“(6) the WIPO Performances and Phonograms Treaty;

and

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

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

“A ‘treaty party’ is a country or intergovernmental organization other than the United States that is a party to an international agreement.”;

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

“The ‘WIPO Copyright Treaty’ is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.”;

(7) by inserting after the definition of “The ‘WIPO Copyright Treaty’” the following:

“The ‘WIPO Performances and Phonograms Treaty’ is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.”; and

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

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

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first published in the United States or such treaty party, as the case may be.”; and

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

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

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

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

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

“(B) a WTO member country;

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

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

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

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

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

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

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

“(C) adheres to the WIPO Copyright Treaty;

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

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

(3) in paragraph (6)—

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

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

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

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

(4) in paragraph (8)(B)(i)—

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

(B) by striking “of eligible countries”; and

(5) by striking paragraph (9).

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

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

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

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

“(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rule-making conducted under subparagraph (C), that noninfringing uses

effectively protects a right of a copyright owner under this title in a work or a portion thereof.

“(2) As used in this subsection—

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

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

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

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

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

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

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

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

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

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

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

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

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

“(4) This subsection may not be used as a defense to a claim under subsection (a)(2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any tech-

nology, product, service, component, or part thereof, which circumvents a technological measure.

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

“(A) open to the public; or

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

“(e) LAW ENFORCEMENT, INTELLIGENCE,

“(A) the term ‘encryption research’ means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products; and

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

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

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

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

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

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

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

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

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

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

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

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

“(B) provide the technological means to another person with whom he or she is working collaboratively for the pur-

pose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).

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

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

“(B) the adequacy and effectiveness of technological measures designed to protect copyrighted works; and

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

The report shall include legislative recommendations, if any.

“(h) EXCEPTIONS REGARDING MINORS.—In applying subsection (a) to a component or part, the court may consider the necessity for its intended and actual incorporation in a technology, product, service, or device, which—

“(1) does not itself violate the provisions of this title; and

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

“(i) PROTECTION OF PERSONALLY IDENTIFYING INFORMATION.—

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States in any one calendar year after the date of the enactment of this chapter;

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

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

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

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

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

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

Manufacturers that have not previously manufactured or sold a VHS format analog video cassette recorder, or an 8mm format analog cassette recorder, shall be required to conform to the four-line colorstripe copy control technology in the initial model of any such recorder manufactured after the date of the enactment of this chapter, and there-

missions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions;

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

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

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

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

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signed, manufactured, marketed, and intended for use by a person who regularly employs such a device for a lawful business or industrial use, including making, performing, displaying, distributing, or transmitting copies of motion pictures on a commercial scale.

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

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

“§ 1202. Integrity of copyright management information

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

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

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

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

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

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

“(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

“(c) DEFINITION.—As used in this section, the term ‘copyright management information’ means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

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

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

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

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

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

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

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

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

“(d) *LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES.*—This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term ‘information security’ means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

“(e) *LIMITATIONS ON LIABILITY.*—

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

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

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

“(2) *DIGITAL TRANSMISSIONS.*—

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

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

“(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

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

“(4) no copy of the material made by the service provider in the course of such intermediate or transient storage 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 such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

“(5) the material is transmitted through the system or network without modification of its content.

“(b) SYSTEM CACHING.—

“(1) LIMITATION ON LIABILITY.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

“(A) the material is made available online by a person other than the service provider,

“(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person, and

“(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A),

if the conditions set forth in paragraph (2) are met.

(2) CONDITIONS.—The conditions referred to in paragraph (1) are that—

“(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

“(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably

impair the intermediate storage to which this subsection applies;

“(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

“(i) does not significantly interfere with the performance of the provider’s system or network or with the intermediate storage of the material;

“(ii) is consistent with generally accepted industry standard communications protocols; and

“(iii) does not extract information from the provider’s system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

“(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a 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 met those conditions and only in accordance with those conditions; and

“(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

“(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

“(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

“(c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—

“(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of 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 mate-

able, 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, its agent, or the law.

“(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

“(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (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.

“(ii) In a case in which the notification that is provided to the service provider’s designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

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

“(1)(A) does not have actual knowledge that the material or activity is infringing;

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

“(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

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

“(3) upon notification of claimed infringement as described in subsection (c)(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, except that, for purposes of this paragraph, the information described 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 that reference or link.

“(e) LIMITATION ON LIABILITY OF NONPROFIT EDUCATIONAL INSTITUTIONS.—(1) When a public or other nonprofit institution of

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 notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

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

“(3) CONTENTS OF COUNTER NOTIFICATION.—To be effective under this subsection, a counter notification must be a 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 the material appeared before it was removed or access to it 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 District 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 notification under subsection (c)(1)(C) or an agent of such person.

“(4) LIMITATION ON OTHER LIABILITY.—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).

“(h) SUBPOENA TO IDENTIFY INFRINGER.—

“(1) REQUEST.—A copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider

for identification of an alleged infringer in accordance with this subsection.

are used by copyright owners to identify or protect copyrighted works and—

“(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.

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

“(1) *SCOPE OF RELIEF.*—(A) With respect to conduct other than that which qualifies for the limitation on remedies set

“(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 on-line 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 be available only after notice to the service provider and an opportunity for the service provider to appear are provided, 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.

“(k) DEFINITIONS.—

“(1) SERVICE PROVIDER.—(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 this section, other than subsection (a), 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 subparagraph (A).

“(2) MONETARY RELIEF.—As used in this section, the term ‘monetary relief’ means damages, costs, attorneys’ fees, and any other form of monetary payment.

“(l) 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.

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

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

“(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

“(n) CONSTRUCTION.—Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.”.

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

“512. Limitations on liability relating to material online.”.

SEC. 203. 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
COPYRIGHT EXEMPTION**

SEC. 301. SHORT TITLE.

This title may be cited as the “Computer Maintenance Competition Assurance Act”.

SEC. 302. LIMITATIONS ON EXCLUSIVE RIGHTS; COMPUTER PROGRAMS.

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

(1) by striking “Notwithstanding” and inserting the following:

“(a) **MAKING OF ADDITIONAL COPY OR ADAPTATION BY OWNER OF COPY.**—Notwithstanding”;

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

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

(3) by adding at the end the following:

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

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

“(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.” of maintn734.I4.O

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—MISCELLANEOUS PROVISIONS

SEC. 401. PROVISIONS RELATING TO THE COMMISSIONER OF PATENTS AND TRADEMARKS AND THE REGISTER OF COPYRIGHTS

(a) **COMPENSATION.**—(1) Section 334.I4. of title 35, United States Code, is amended by striking “prescribed by law for Assistant Sec-

retaries of Commerce” and inserting “in effect for level III of the Executive Schedule under section 5314 of title 5, United States Code”.

(2) Section 701(e) of title 17, United States Code, is amended—

(A) by striking “IV” and inserting “III”; and

(B) by striking “5315” and inserting “5314”.

(3) Section 5314 of title 5, United States Code, is amended by adding at the end the following:

“Assistant Secretary of Commerce and Commissioner of Patents and Trademarks.

“Register of Copyrights.”.

(b) CLARIFICATION OF AUTHORITY OF THE COPYRIGHT OFFICE.— Section 701 of title 17, United States Code, is amended—

(1) by redesignating subsections (b) through (e) as subsections (c) through (f), respectively; and

(2) by inserting after subsection (a) the following:

“(b) In addition to the functions and duties set out elsewhere in this chapter, the Register of Copyrights shall perform the following functions:

“(1) Advise Congress on national and international issues relating to copyright, other matters arising under this title, and related matters.

“(2) Provide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters.

“(3) Participate in meetings of international intergovernmental organizations and meetings with foreign government officials relating to copyright, other matters arising under this title, and related matters, including as a member of United States delegations as authorized by the appropriate Executive branch authority.

“(4) Conduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright Office, or any function vested in the Copyright Office by law, including educational programs conducted cooperatively with foreign intellectual property offices and international intergovernmental organizations.

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“(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization’s reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.”

SEC. 403. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE EDU-

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

SEC. 404. EXEMPTION FOR LIBRARIES AND ARCHIVES.

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

(1) in subsection (a)—

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

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

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

(2) in subsection (b)—

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

(B) by striking “in facsimile form”;

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

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

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

(3) in subsection (c)—

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

(B) by striking “in facsimile form”;

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

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

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

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

(E) by adding at the end the following:

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

SEC. 405. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS; EPHEMERAL RECORDINGS.

(a) *SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.*—Section 114 of title 17, United States Code, is amended as follows:

(1) Subsection (d) is amended—

(A) in paragraph (1) by striking subparagraph (A) and inserting the following:

“(A) a nonsubscription broadcast transmission;” and

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

“(2) *STATUTORY LICENSING OF CERTAIN TRANSMISSIONS.*—

The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—

“(A)(i) the transmission is not part of an interactive service;

“(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and

“(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

“(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

“(i) the transmission does not exceed the sound recording performance complement; and

“(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

“(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998—

“(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retrans-

“(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

“(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

“(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration,

except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

“(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

“(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity’s transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

“(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in

a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

“(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

“(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

“(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the case in which devices or technology intended for receiving the service provided by the transmitting entity that

have the capability to display such textual data are not common in the marketplace.”.

(2) Subsection (f) is amended—

(A) in the subsection heading by striking “NONEXEMPT SUBSCRIPTION” and inserting “CERTAIN NONEXEMPT”;

(B) in paragraph (1)—

(i) in the first sentence—

(I) by striking “(1) No” and inserting “(1)(A) No”;

(II) by striking “the activities” and inserting “subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services”; and

(III) by striking “2000” and inserting “2001”;

and

(ii) by amending the third sentence to read as follows: “Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Librarian of Congress licenses covering such subscription transmissions with respect to such sound recordings.”; and

(C) by striking paragraphs (2), (3), (4), and (5) and inserting the following:

“(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the copyright arbitration royalty panel may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in subparagraph (A).

“(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe—

“(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational; and

“(II) in the first week of January, 2001, and at 5-year intervals thereafter.

“(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

“(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I) of this subparagraph; or

“(II) on July 1, 2001, and at 5-year intervals thereafter.

“(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

“(2)(A) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Librarian of Congress licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

*“(B) In the ar 3cs and9es aAllty pa(each n aftitio enact-)Tj-2 -1yhe enactment me3tet in01 3cs as a162atcriptiotiA)ring thetsria (ation of vochapt the enactmen218 Tw3tet c “bi*0.138 (TjT a16b(T4.)Tj2 -)TjT*0.334 Tw(ties performingTjT*w3t paragraph)Tjrs of soun service. Any copyright owne op-*

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resent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including—

“(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and

“(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).

“(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated in accordance with regulations that the Librarian of Congress shall prescribe—

“(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational; and

“(II) in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

“(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

“(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I); or

“(II) on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

“(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802.

“(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

“(4)(A) The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings.

“(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—

“(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

“(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

missions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

“(7) An ‘interactive service’ is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

“(8) A ‘new subscription service’ is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.”;

(E) by inserting after paragraph (9), as so redesignated, the following:

“(10) A ‘preexisting satellite digital audio radio service’ is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

“(11) A ‘preexisting subscription service’ is a service that performs sound recordings by means of noninteractive audio-only subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.”; and

(F) by adding at the end the following:

“(15) A ‘transmission’ is either an initial transmission or a retransmission.”.

rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

“(5) In the absence of license agreements negotiated under paragraph (3), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (4), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (6), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The copyright arbitration royalty panel shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive, and programming information presented by the parties, including—

“(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner’s traditional streams of revenue; and

“(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms under voluntary license agreements negotiated as provided in paragraphs (3) and (4). The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

“(6) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress.

“(7) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (4) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, in the first week of January 2000, and at 2-year intervals

thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (4). The procedures specified in paragraph (5) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1), during a 60-day period commencing on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (4). The procedures specified in paragraph (5) shall be concluded in accordance with section 802.

“(8)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

“(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

“(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection.

“(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

“(9) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from doing so in accordance with section 106(1) or 106(2), the organization shall be entitled to a reasonable royalty for the use of the phonorecord under this subsection in accordance with section 106(4).”

(A) in the first sentence by striking "60" and inserting "90"; and

(B) in the third sentence by striking "that 60-day period" and inserting "an additional 30-day period"; and

assumption agreements applicable to the copyright ownership being transferred that are required by the applicable collective bargaining agreement, and the transferee shall be subject to the obligations under each such assumption agreement to make residual payments and provide related notices, accruing after the effective date of the transfer and applicable to the exploitation of the rights transferred, and any remedies under each such assumption agreement for breach of those obligations, as those obligations and remedies are set forth in the applicable collective bargaining agreement, if—

“(A) the transferee knows or has reason to know at the time of the transfer that such collective bargaining agreement was or will be applicable to the motion picture; or

“(B) in the event of a court order confirming an arbitration award against the transferor under the collective bargaining agreement, the transferor does not have the financial ability to satisfy the award within 90 days after the order is issued.

“(2) For purposes of paragraph (1)(A), ‘knows or has reason to know’ means any of the following:

“(A) Actual knowledge that the collective bargaining agreement was or will be applicable to the motion picture.

“(B)(i) Constructive knowledge that the collective bargaining agreement was or will be applicable to the motion picture, arising from recordation of a document pertaining to copyright in the motion picture under section 205 of title 17 or from publication, at a site available to the public on-line that is operated by the relevant union, of information that identifies the motion picture as subject to a collective bargaining agreement with that union, if the site permits commercially reasonable verification of the date on which the information was available for access.

“(ii) Clause (i) applies only if the transfer referred to in subsection (a)(1) occurs—

“(i) after the motion picture is completed, or

“(ii) before the motion picture is completed and—

“(I) within 18 months before the filing of an application for copyright registration for the motion picture under section 408 of title 17, or

“(II) if no such application is filed, within 18 months before the first publication of the motion picture in the United States.

“(C) Awareness of other facts and circumstances pertaining to a particular transfer from which it is apparent that the collective bargaining agreement was or will be applicable to the motion picture.

“(b) SCOPE OF EXCLUSION OF TRANSFERS OF

TITLE V—PROTECTION OF CERTAIN ORIGINAL DESIGNS

SEC. 501. SHORT TITLE.

This Act may be referred to as the “Vessel Hull Design Protection Act”.

SEC. 502. PROTECTION OF CERTAIN ORIGINAL DESIGNS.

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

“CHAPTER 13—PROTECTION OF ORIGINAL DESIGNS

“Sec.

“1301. Designs protected.

“1302. Designs not subject to protection.

“1303. Revisions, adaptations, and rearrangements.

“1304. Commencement of protection.

“1305. Term of protection.

“1306. Design notice.

“1307. Effect of omission of notice.

“1308. Exclusive rights.

“1309. Infringement.

“1310. Application for registration.

“1311. Benefit of earlier filing date in foreign country.

“1312. Oaths and acknowledgments.

“1313. Examination of application and issue or refusal of registration.

“1314. Certification of registration.

“1315. Publication of announcements and indexes.

“1316. Fees.

“1317. Regulations.

“1318. Copies of records.

“1319. Correction of errors in certificates.

“1320. Ownership and transfer.

“1321. Remedy for infringement.

“1322. Injunctions.

“1323. Recovery for infringement.

“1324. Power of court over registration.

“1325. Liability for action on registration fraudulently obtained.

“1326. Penalty for false marking.

“1327. Penalty for false representation.

“1328. Enforcement by Treasury and Postal Service.

“1329. Relation to design patent law.

“1330. Common law and other rights unaffected.

“1331. Administrator; Office of the Administrator.

“1332. No retroactive effect.

“§ 1301. Designs protected

“(a) DESIGNS PROTECTED.—

“(1) IN GENERAL.—The designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter.

“(2) VESSEL HULLS.—The design of a vessel hull, including a plug or mold, is subject to protection under this chapter, notwithstanding section 1302(4).

“(b) DEFINITIONS.—For the purpose of this chapter, the following terms have the following meanings:

“(1) A design is ‘original’ if it is the result of the designer’s creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.

“(2) A ‘useful article’ is a vessel hull, including a plug or mold, which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article which normally is part of a useful article shall be deemed to be a useful article.

“(3) A ‘vessel’ is a craft, especially one larger than a row-boat, designed to navigate on water, but does not include any such craft that exceeds 200 feet in length.

“(4) A ‘hull’ is the frame or body of a vessel, including the deck of a vessel, exclusive of masts, sails, yards, and rigging.

“(5) A ‘plug’ means a device or model used to make a mold for the purpose of exact duplication, regardless of whether the device or model has an intrinsic utilitarian function that is not only to portray the appearance of the product or to convey information.

“(6) A ‘mold’ means a matrix or form in which a substance for material is used, regardless of whether the matrix or form has an intrinsic utilitarian function that is not only to portray the appearance of the product or to convey information.

“§ 1302. Designs not subject to protection

“Protection under this chapter shall not be available for a design that is—

“(1) not original;

“(2) staple or commonplace, such as a standard geometric figure, a familiar symbol, an emblem, or a motif, or another shape, pattern, or configuration which has become standard, common, prevalent, or ordinary;

“(3) different from a design excluded by paragraph (2) only

“§ 1305. Term of protection

“(a) *IN GENERAL.*—Subject to subsection (b), the protection provided under this chapter for a design shall continue for a term of 10 years beginning on the date of the commencement of protection under section 1304.

“(b) *EXPIRATION.*—All terms of protection provided in this section shall run to the end of the calendar year in which they would otherwise expire.

“(c) *TERMINATION OF RIGHTS.*—Upon expiration or termination of protection in a particular design under this chapter, all rights under this chapter in the design shall terminate, regardless of the number of different articles in which the design may have been used during the term of its protection.

“§ 1306. Design notice

“(a) *CONTENTS OF DESIGN NOTICE.*—(1) Whenever any design for which protection is sought under this chapter is made public under section 1310(b), the owner of the design shall, subject to the provisions of section 1307, mark it or have it marked legibly with a design notice consisting of—

“(A) the words ‘Protected Design’, the abbreviation ‘Prot’d Des.’, or the letter ‘D’ with a circle, or the symbol *D*;

“(B) the year of the date on which protection for the design commenced; and

“(C) the name of the owner, an abbreviation by which the name can be recognized, or a generally accepted alternative designation of the owner.

Any distinctive identification of the owner may be used for purposes of subparagraph (C) if it has been recorded by the Administrator before the design marked with such identification is registered.

“(2) After registration, the registration number may be used instead of the elements specified in subparagraphs (B) and (C) of paragraph (1).

“(b) *LOCATION OF NOTICE.*—The design notice shall be so located and applied as to give reasonable notice of design protection while the useful article embodying the design is passing through its normal channels of commerce.

“(c) *SUBSEQUENT REMOVAL OF NOTICE.*—When the owner of a design has complied with the provisions of this section, protection under this chapter shall not be affected by the removal, destruction, or obliteration by others of the design notice on an article.

“§ 1307. Effect of omission of notice

“(a) *ACTIONS WITH NOTICE.*—Except as provided in subsection (b), the omission of the notice prescribed in section 1306 shall not cause loss of the protection under this chapter or prevent recovery for infringement under this chapter against any person who, after receiving written notice of the design protection, begins an undertak-

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with respect to such undertaking unless the owner of the design reimburses that person for any reasonable expenditure or contractual obligation in connection with such undertaking that was incurred before receiving written notice of the design protection, as the court in its discretion directs. The burden of providing written notice of design protection shall be on the owner of the design.

“§ 1308. Exclusive rights

“The owner of a design protected under this chapter has the exclusive right to—

“(1) make, have made, or import, for sale or for use in trade, any useful article embodying that design; and

“(2) sell or distribute for sale or for use in trade any useful article embodying that design.

“§ 1309. Infringement

“(a) ACTS OF INFRINGEMENT.—Except as provided in subsection (b), it shall be infringement of the exclusive rights in a design protected under this chapter for any person, without the consent of the owner of the design, within the United States and during the term of such protection, to—

“(1) make, have made, or import, for sale or for use in trade, any infringing article as defined in subsection (e); or

“(2) sell or distribute for sale or for use in trade any such infringing article.

*“(b) ACTS OFS Tm(I)Tj8 0 0 7555121 193.8 376.4ELLERm[(CTAND-432(OF)]TJ10 07.5326228.6i-Ilar(D Tm(I)Tj8 0
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the infringing article shall be deemed ordering or reordering within the meaning of subsection (b)(2).

“(e) INFRINGING ARTICLE DEFINED.—As used in this section, an ‘infringing article’ is any article the design of which has been copied from a design protected under this chapter, without the consent of the owner of the protected design. An infringing article is not an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium. A design shall not be deemed to have been copied from a protected design if it is original and not substantially similar in appearance to a protected design.

“(f) ESTABLISHING ORIGINALITY.—The party to any action or proceeding under this chapter who alleges rights under this chapter

applicant's duly authorized agent or representative, setting forth, to the best of the applicant's knowledge and belief—

“(1) that the design is original and was created by the designer or designers named in the application;

is filed within 6 months after the earliest date on which any such foreign application was filed.

“§ 1312. Oaths and acknowledgments

“(a) *IN GENERAL.*—Oaths and acknowledgments required by this chapter—

“(1) may be made—

“(A) before any person in the United States authorized by law to administer oaths; or

“(B) when made in a foreign country, before any diplomatic or consular officer of the United States authorized to administer oaths, or before any official authorized to administer oaths in the foreign country concerned, whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States; and

“(2) shall be valid if they comply with the laws of the State or country where made.

“(b) *WRITTEN DECLARATION IN LIEU OF OATH.*—(1) The Administrator may by rule prescribe that any document which is to be filed under this chapter in the Office of the Administrator and which is required by any law, rule, or other regulation to be under oath, may be subscribed to by a written declaration in such form as the Administrator may prescribe, and such declaration shall be in lieu of the oath otherwise required.

“(2) Whenever a written declaration under paragraph (1) is used, the document containing the declaration shall state that willful false statements are punishable by fine or imprisonment, or both, pursuant to section 1001 of title 18, and may jeopardize the validity of the application or document or a registration resulting therefrom.

“§ 1313. Examination of application and issue or refusal of registration

“(a) *DETERMINATION OF REGISTRABILITY OF DESIGN; REGISTRATION.*—Upon the filing of an application for registration in proper form under section 1310, and upon payment of the fee prescribed under section 1316, the Administrator shall determine whether or not the application relates to a design which on its face appears to be subject to protection under this chapter, and, if so, the Register shall register the design. Registration under this subsection shall be ann fficd by any law, rule, pubs to a d.-23.datic or proper

chapter may, upon payment of the prescribed fee, apply to the Administrator at any time to cancel the registration on the ground that the design is not subject to protection under this chapter, stating the reasons for the request. Upon receipt of an application for cancellation, the Administrator shall send to the owner of the design, as shown in the records of the Office of the Administrator, a notice of the application, and the owner shall have a period of 3 months after the date on which such notice is mailed in which to present arguments to the Administrator for support of the validity of the registration. The Administrator shall also have the authority to establish, by regulation, conditions under which the opposing parties may appear and be heard in support of their arguments. If, after the periods provided for the presentation of arguments have expired, the Administrator determines that the applicant for cancellation has established that the design is not subject to protection under this chapter, the Administrator shall order the registration stricken from the record. Cancellation under this subsection shall be announced by publication, and notice of the Administrator's final determination with respect to any application for cancellation shall be sent to the applicant and to the owner of record.

“§ 1317. Regulations

“The Administrator may establish regulations for the administration of this chapter.

“§ 1318. Copies of records

“Upon payment of the prescribed fee, any person may obtain a certified copy of any official record of the Office of the Administrator that relates to this chapter. That copy shall be admissible in evidence with the same effect as the original.

“§ 1319. Correction of errors in certificates

“The Administrator may, by a certificate of correction under seal, correct any error in a registration incurred through the fault of the Office, or, upon payment of the required fee, any error of a clerical or typographical nature occurring in good faith but not through the fault of the Office. Such registration, together with the certificate, shall thereafter have the same effect as if it had been originally issued in such corrected form.

“§ 1320. Ownership and transfer

“(a) PROPERTY RIGHT IN DESIGN.—The property right in a design subject to protection under this chapter shall vest in the designer, the legal representatives of a deceased designer or of one under legal incapacity, the employer for whom the designer created the design in the case of a design made within the regular scope of the designer’s employment, or a person to whom the rights of the designer or of such employer have been transferred. The person in whom the property right is vested shall be considered the owner of the design.

“(b) TRANSFER OF PROPERTY RIGHT.—The property right in a registered design, or a design for which an application for registration has been or may be filed, may be assigned, granted, conveyed, or mortgaged by an instrument in writing, signed by the owner, or may be bequeathed by will.

“(c) OATH OR ACKNOWLEDGEMENT OF TRANSFER.—An oath or acknowledgment under section 1312 shall be prima facie evidence of the execution of an assignment, grant, conveyance, or mortgage under subsection (b).

“(d) RECORDATION OF TRANSFER.—An assignment, grant, conveyance, or mortgage under subsection (b) shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, unless it is recorded in the Office of the Administrator within 3 months after its date of execution or before the date of such subsequent purchase or mortgage.

“§ 1321. Remedy for infringement

“(a) IN GENERAL.—The owner of a design is entitled, after issuance of a certificate of registration of the design under this chapter, to institute an action for any infringement of the design.

“(b) REVIEW OF REFUSAL TO REGISTER.—(1) Subject to paragraph (2), the owner of a design may seek judicial review of a final refusal of the Administrator to register the design under this chapter by bringing a civil action, and may in the same action, if the

court adjudges the design subject to protection under this chapter, enforce the rights in that design under this chapter.

“(2) The owner of a design may seek judicial review under this section if—

“(A) the owner has previously duly filed and prosecuted to final refusal an application in proper form for registration of the design;

“(B) the owner causes a copy of the complaint in the action to be delivered to the Administrator within 10 days after the commencement of the action; and

“(C) the defendant has committed acts in respect to the design which would constitute infringement with respect to a design protected under this chapter.

“(c) ADMINISTRATOR AS PARTY TO ACTION.—The Administrator may, at the Administrator’s option, become a party to the action with respect to the issue of registrability of the design claim by entering an appearance within 60 days after being served with the complaint, but the failure of the Administrator to become a party shall not deprive the court of jurisdiction to determine that issue.

“(d) USE OF ARBITRATION TO RESOLVE DISPUTE.—The parties to an infringement dispute under this chapter, within such time as may be specified by the Administrator by regulation, may determine the dispute, or any aspect of the dispute, by arbitration. Arbitration shall be governed by title 9. The parties shall give notice of any arbitration award to the Administrator, and such award shall, as between the parties to the arbitration, be dispositive of the issues to which it relates. The arbitration award shall be unenforceable until such notice is given. Nothing in this subsection shall preclude the Administrator from determining whether a design is subject to registration in a cancellation proceeding under section 1313(c).

§ 1322. Injunctions

“(a) IN GENERAL.—A court having jurisdiction over actions under this chapter may grant injunctions in accordance with the principles of equity to prevent infringement of a design under this

pensation and not a penalty. The court may receive expert testimony as an aid to the determination of damages.

“(b) *INFRINGER’S PROFITS*.—As an alternative to the remedies provided in subsection (a), the court may award the claimant the infringer’s profits resulting from the sale of the copies if the court finds that the infringer’s sales are reasonably related to the use of the claimant’s design. In such a case, the claimant shall be required to prove only the amount of the infringer’s sales and the infringer shall be required to prove its expenses against such sales.

“(c) *STATUTE OF LIMITATIONS*.—No recovery under subsection (a) or (b) shall be had for any infringement committed more than 3 years before the date on which the complaint is filed.

“(d) *ATTORNEY’S FEES*.—In an action for infringement under this chapter, the court may award reasonable attorney’s fees to the prevailing party.

“(e) *DISPOSITION OF INFRINGING AND OTHER ARTICLES*.—The court may order that all infringing articles, and any plates, molds, patterns, models, or other means specifically adapted for making the articles, be delivered up for destruction or other disposition as the court may direct.

“§ 1324. Power of court over registration

“In any action involving the protection of a design under this chapter, the court, when appropriate, may order registration of a design under this chapter or the cancellation of such a registration. Any such order shall be certified by the court to the Administrator, who shall make an appropriate entry upon the record.

“§ 1325. Liability for action on registration fraudulently obtained

“Any person who brings an action for infringement knowing that registration of the design was obtained by a false or fraudulent representation materially affecting the rights under this chapter, shall be liable in the sum of \$10,000, or such part of that amount as the court may determine. That amount shall be to compensate the defendant and shall be charged against the plaintiff and paid to the defendant, in addition to such costs and attorney’s fees of the defendant as may be assessed by the court.

“§ 1326. Penalty for false marking

“(a) *IN GENERAL*.—Whoever, for the purpose of deceiving the public, marks upon, applies to, or uses in advertising in connection with an article made, used, distributed, or sold, a design which is not protected under this chapter, a design notice specified in section

“§ 1327. Penalty for false representation

“Whoever knowingly makes a false representation materially affecting the rights obtainable under this chapter for the purpose of obtaining registration of a design under this chapter shall pay a penalty of not less than \$500 and not more than \$1,000, and any rights or privileges that individual may have in the design under this chapter shall be forfeited.

“§ 1328. Enforcement by Treasury and Postal Service

“(a) REGULATIONS.—The Secretary of the Treasury and the United States Postal Service shall separately or jointly issue regulations for the enforcement of the rights set forth in section 1308 with

“§ 1332. No retroactive effect

“Protection under this chapter shall not be available for any design that has been made public under section 1310(b) before the effective date of this chapter.”.

SEC. 503. CONFORMING AMENDMENTS.

(a) T

(4) the effect, if any, of the amendments made by this title on the price of vessels with hulls protected under such amendments; and

(5) such other considerations as the Register and the Commissioner may deem relevant to accomplish the purposes of the evaluation conducted under subsection (a).

SEC. 505. EFFECTIVE DATE.

The amendments made by sections 502 and 503 shall take effect on the date of the enactment of this Act and shall remain in effect until the end of the 2-year period beginning on such date of enactment. No cause of action based on chapter 13 of title 17, United States Code, as added by this title, may be filed after the end of that 2-year period.

Amend the title so as to read: "A bill to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes."

And the Senate agree to the same.

From the Committee on Commerce, for consideration of the House bill, and the Senate amendment, and modifications committed to conference:

TOM BLILEY,
BILLY TAUZIN,
JOHN D. DINGELL,

From the Committee on the Judiciary, for consideration of the House bill, and the Senate amendment, and modifications committed to conference:

HENRY J. HYDE,
HOWARD COBLE,
BOB GOODLATTE

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF
CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2281) to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

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

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

TITLE I—WIPO TREATIES I26e

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

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

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

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

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

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

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

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

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

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

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

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

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

In order to resolve these concerns, Section 1201(j) creates an

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

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

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

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

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

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

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

With regard to the specific elements of this provision:

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

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

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

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

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

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

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

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

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

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

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

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

Seventh, paragraph (1)(B) contains a number of points worthy of explanation. In general, the requirement in paragraph (1)(B) is that manufacturers not materially reduce the responsiveness of the device.

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

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

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

The Senate recedes to House section 105 with modification.

SECTION 105. EFFECTIVE DATE

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

TITLE II—ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment. At the same time, it provides greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities.

SECTION 201. SHORT TITLE

The Senate recedes to House section 201. This section sets forth the short title of the Act. The Senate accepts the House formulation.

SECTION 202. LIMITATIONS ON LIABILITY FOR COPYRIGHT
INFRINGEMENT

The Senate recedes to House section 202 with modification. This section amends chapter 5 of the Copyright Act (17 U.S.C. 501, *et seq.*) to create a new section 512, titled "Limitations on liability

In general, Title II provides that a university or other public or nonprofit institution of higher education which is also a "service provider" (as that term is defined in title II) is eligible for the limitations on liability provided in title II to the same extent as any other service provider.

However, the conferees recognize that the university environment is unique. Ordinarily, a service provider may fail to qualify for the liability limitations in Title II simply because the knowledge or actions of one of its employees may be imputed to it under basic principles of respondeat superior and agency law. The special rela-

fringing faculty member and/or the infringing graduate student within the last three years. The reference to “providing online access” to instructional materials includes the use of e-mail for that purpose. The phrase “required or recommended” is intended to refer to instructional materials that have been formally and specifically identified in a list of course materials that is provided to all students enrolled in the course for credit; it is not intended, however, to refer to the other materials which, from time to time, the faculty member or graduate student may incidentally and informally bring to the attention of students for their consideration during the course of instruction.

Second, under paragraph (B) the institution must not have received more than two notifications of claimed infringement with respect to the particular faculty member or particular graduate student within the last three years. If more than two such notifications have been received, the institution may be considered to be on notice of a pattern of infringing conduct by the faculty member or graduate student, and the limitation of subsection (e) does not apply with respect to the subsequent infringing actions of that faculty member or that graduate student. Where more than two notifications have previously been received with regard to a particular faculty member or graduate student, the institution will only become potentially liable for the infringing actions of that faculty member or that graduate student. Any notification of infringement that gives rise to a cause of action for misrepresentation under subsection (f) does not count for purposes of paragraph (B).

Third, paragraph (C) states that the institution must provide to the users of its system or network—whether they are administrative employees, faculty, or students—materials that accurately describe and promote compliance with copyright law. The legislation allows, but does not require, the institutions to use relevant informational materials published by the U.S. Copyright Office in satisfying the condition imposed by paragraph (C).

Subsection (e)(2) defines the terms and conditions under which an injunction may be issued against an institution of higher education that is a service provider in cases to which subsection (e)(1) applies. First, all the factors and considerations taken into account

learning is not changed by subsection (e). In this regard, subsection (e) is fully consistent with the rest of section 512, which neither creates any new liabilities for service providers, nor affects any defense to infringement available to a service provider. Finally, subsection (e) has no applicability to any case asserting that a university is liable for copyright infringement in any capacity other than as a service provider.

SECTION 203. EFFECTIVE DATE

The Senate recedes to House section 203. This section sets forth the effective date of the amendments made by this title. The corresponding sections of the House bill and the Senate amendment are substantively identical.

TITLE III—COMPUTER MAINTENANCE OR REPAIR COPYRIGHT EXEMPTION

SECTIONS 301–302

The Senate recedes to the House sections 301–302. These sections effect a minor, yet important clarification in section 117 of the Copyright Act to ensure that the lawful owner or lessee of a computer machine may authorize an independent service provider—a person unaffiliated with either the owner or lessee of the machine—to activate the machine for the sole purpose of servicing its hardware components. When a computer is activated, certain software or parts thereof is automatically copied into the machine's random access memory, or "RAM". A clarification in the Copyright Act is necessary in light of judicial decisions holding that such copying is a "reproduction" under section 106 of the Copyright Act (17 U.S.C. 106),¹ thereby calling into question the right of an independent service provider who is not the licensee of the computer program resident on the client's machine to even activate that machine for the purpose of servicing the hardware components. This section does not in any way alter the law with respect to the scope of the term "reproduction" as it is used the Copyright Act. Rather, this section it is narrowly crafted to achieve the objectives just described—namely, ensuring that an independent service provider may turn on a client's computer machine in order to service its hardware components, provided that such service provider complies with the provisions of this section designed to protect the rights of copyright owners of computer software. The corresponding sections of the House bill and the Senate amendment are substantively identical.

TITLE IV—MISCELLANEOUS P

¹ See *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511 (9th Cir. 1993), cert. denied, 114 S.Ct. 671 (1994).

marks and clarifies the duties and functions of the Register of Copyrights.

The new subsection to be added to 17 U.S.C. § 701 sets forth in express statutory language the functions presently performed by the Register of Copyrights under her general administrative authority under subsection 701(a). Like the Library of Congress, its parent agency, the Copyright Office is a hybrid entity that historically has performed both legislative and executive or administrative functions. *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978). Existing subsection 701(a) addresses some of the latter functions. New subsection 701(b) is intended to codify the other traditional roles of the Copyright Office and to confirm the Register's existing areas of jurisdiction.

Paragraph (1) of new subsection 701(b) reflects the Copyright Office's longstanding role as advisor to Congress on matters within its competence. This includes copyright and all matters within the scope of title 17 of the U.S. Code. Such advice, which often takes the form of testimony of pending legislation, is separate from testimony or other recommendations by the Administration pursuant to the President's concurrent constitutional power to make recommendations to Congress.

Paragraph (2) reflects the Copyright Office's longstanding role in advising federal agencies on matters within its competence. For example, the Copyright Office advises the U.S. Trade Representative and the State Department on an ongoing basis on the adequacy of foreign copyright laws, and serves as a technical consultant to those agencies in bilateral, regional and multilateral consultations or negotiations with other countries on copyright-related issues.

Paragraph (3) reflects the Copyright Office's longstanding role as a key participant in international meetings of various kinds, including as part of U.S. delegations as authorized by the Executive Branch, serving as substantive experts on matters within the Copyright Office's competence. Recent examples of the Copyright Office acting in the capacity include its central role on the U.S. delegation that negotiated the two new WIPO treaties at the 1996 Diplomatic Conference in Geneva, and its ongoing contributions of technical assistance in the TRIPS Council of the World Trade Organization and the Register's role as a featured speaker at numerous WIPO conferences.

Paragraph (4) describes the studies and programs that the Copyright Office has long carried out as the agency responsible for administering the copyright law and other chapters of title 17. Among the most important of these studies historically was a series of comprehensive reports on various issues produced in the 1960's as the foundation of the last general revision of U.S. copyright law, enacted as the 1976 Copyright Act. Most recently the Copyright Office has completed reports on the cable and satellite compulsory licenses, legal protection for databases, and the economic and policy implications of term extension. Consistent with the Copyright Office's role as a legislative branch agency, these studies have often included specific policy recommendations to Congress. The reference to "programs" includes such projects as the conferences the Copyright Office cosponsored in 1996-97 on the

subject of technology-based intellectual property management, and the International Copyright Institutes that the Copyright Office has conducted for foreign government officials at least annually

violating section 1201(a)(1), then the radio station could request from the copyright owner the necessary means of making a permitted ephemeral recording. If the copyright owner did not then either provide a phonorecord that could be reproduced or otherwise provide the necessary means of making a permitted ephemeral recording from the phonorecord already in the possession of the radio station, the radio station would not be liable for violating section 1201(a)(1) for taking the steps necessary for engaging in activities permitted under section 112(a)(1). The radio station would, of course, be liable for violating section 1201(a)(1) if it engaged in activities prohibited by that section in other than the limited circumstances permitted by section 112(a)(1).

House section 411 is modified in two respects. First, the House provision is modified by adding a new paragraph (3) to include specific reference to section 114(f) in section 112(a) of the Copyright Act. The addition to section 112(a) of a reference to section 114(f) is intended to make clear that subscription music services, webcasters, satellite digital audio radio services and others with statutory licenses for the performance of sound recordings under section 114(f) are entitled to the benefits of section 112(a) with respect to the sound recordings they transmit.

Second, the House provision is modified in paragraph (4). This amendment to section 112(a) is intended to clarify the application of section 112(a) to FCC-licensed broadcasters with respect to digital nonsubscription broadcast transmissions. Notwithstanding this clarification, neither the amendment in paragraph (4) of section 411 nor the creation of a statutory license in section 112(e) is in any manner intended to narrow the scope of section 112(a) or the entitlement of any transmitting entity to the exemption provided thereunder with respect to copies made for other transmissions.

SECTION 403. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE EDUCATION

The Senate recedes to House section 412. The corresponding sections of the House bill and the Senate amendment are substantively identical.

SECTION 404. EXEMPTION FOR LIBRARIES AND ARCHIVES

The Senate recedes to House section 413. The corresponding sections of the House bill and the Senate amendment are substantively identical.

SECTION 405. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS; EPHEMERAL RECORDINGS

The Senate recedes to section 415 of the House bill with modification.

The amendments to sections 112 and 114 of the Copyright Act that are contained in this section of the bill are intended to achieve two purposes: first, to further a stated objective of Congress when it passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") to ensure that recording artists and record companies will be protected as new technologies affect the ways in which their creative works are used; and second, to create fair and

efficient licensing mechanisms that address the complex issues facing copyright owners and copyright users as a result of the rapid growth of digital audio services. This section contains amendments to sections 112 and 114 of Title 17 as follows:

Section 114(d)(1). Exempt Transmissions and Retransmissions. Section 114(d)(1)(A) is amended to delete two exemptions that were either the cause of confusion as to the application of the DPRA to certain nonsubscription services (especially webcasters) or which overlapped with other exemptions (such as the exemption in subsection (A)(iii) for nonsubscription broadcast transmissions). The deletion of these two exemptions is not intended to affect the exemption for nonsubscription broadcast transmissions.

subscription services making transmissions in the same medium as on July 31, 1998, was to prevent disruption of the existing operations by such services. There was only three such services that exist: DMX (operated by TCI Music), Music Choice (operated by Digital Cable Radio Associates), and the DiSH Network (operated by Muzak). As of July 31, 1998, DMX and Music Choice made transmissions via both cable and satellite media; the DiSH Network was available only via satellite. The purpose of distinguishing the preexisting satellite digital audio radio services is similar. The two preexisting satellite digital audio radio services, CD Radio and American Mobile Radio Corporation, have purchased licenses at auction from the FCC and have begun developing their satellite systems.

The two conditions contained in subparagraph (B) are taken directly from previous subsection (d)(2). Thus, preexisting satellite digital audio radio services and the historical operations of preexisting subscription services are subject to the same five conditions for eligibility for a statutory license, as set forth in subparagraphs (A) and (B), as have applied previously to these services.

Subparagraph (C) sets forth additional conditions for a statutory license applicable to all transmissions not subject to subparagraph (B), namely all eligible nonsubscription transmissions, subscription transmissions made by a new subscription service, and subscription transmissions made by a preexisting subscription service other than those made in the same transmission medium. Subparagraph (C) contains nine conditions.

Subparagraph (C)(i) requires that transmissions subject to a statutory license cannot exceed the sound recording performance complement defined in subsection (j)(13), which is unchanged by this amendment. Subparagraph (C)(i) eliminates this requirement for retransmissions of over-the-air broadcast transmissions by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the initial broadcast transmission, subject to two limitations.

First, the retransmissions are not eligible for statutory licensing if the retransmitted broadcast transmissions are in digital lig

on the service. Moreover, services may not induce or facilitate the advance publication of schedules or the making of prior announcements, such as by providing a third party the list of songs or artists to be performed by the transmitting entity for publication or announcement by the third party. The conferees do not intend that the term "prior announcement" preclude a transmitting entity from identifying specific sound recordings immediately before they are performed.

However, services may generally use the names of several fea-

cordings, in a manner that is likely to cause a listener to believe that there is an affiliation or association between the sound recording copyright owner or featured artist and a particular product or service advertised by the transmitting entity. This would cover, for example, transmitting an advertisement for a particular product or service every time a particular sound recording or artist is transmitted; it would not cover more general practices such as targeting advertisements of particular products or services to specific channels of the service according to user demographics. If, for example, advertisements are transmitted randomly while sound recordings are performed, this subparagraph would be satisfied.

Subparagraph (C)(v) provides that, in order to qualify for a statutory license, a transmitting entity must cooperate with sound recording copyright owners to prevent a transmission recipient from scanning the transmitting entity's transmissions to select particular sound recordings. In the future, a device or software may be developed that would enable its user to scan one or more digital transmissions to select particular sound recordings or artists requested by its user. Such devices or software would be the equivalent of an on demand service that would not be eligible for the statutory license. Technology may be developed to defeat such scanning, and transmitting entities taking a statutory license are required to cooperate with sound recording copyright owners to prevent such scanning, provided that such cooperation does not impose substantial costs or burdens on the transmitting entity. This requirement does not apply to a satellite digital audio service, including a preexisting satellite digital audio radio service, that is in operation, or that is licensed by the FCC, on or before July 31, 1998.

Subparagraph (C)(vi) requires that if the technology used by q (Cg "stream" Tw(from scanys.264 Tw(transmi-2 -1 T enables the06if the technology used by)Tj(

new subscription services (including subscription transmissions made by a preexisting subscription service other than those that qualify under subsection (f)(1)) as well as eligible nonsubscription transmissions (subsection (f)(2)).

Subsection (f)(1) provides for procedures applicable to subscription transmission by preexisting subscription services and preexisting satellite digital audio radio services. The conferees note that this subsection applies only to the three services considered preexisting subscription services, DMX, Music Choice and the DiSH Network, and the two services considered preexisting satellite digital audio radio services, CD Radio and American Mobile Radio Corporation. The procedures in this subsection remain the same as those applicable before the amendment, except that the rate currently in effect under prior section 114(f) is extended from December 31, 2000 until December 31, 2001. That rate currently applies to the three preexisting subscription services, and the Conferees take no position on its applicability to the two preexisting satellite digital audio radio services. Likewise, the initiation of the next voluntary negotiation period shall take place in the first week of January 2001 instead of January 2000 (subsection (f)(1)(C)(i)). These extensions are made purely to facilitate the scheduling of proceedings.

Subsection (f)(1)(B), which sets forth procedures for arbitration in the absence of negotiated license agreement, continues to provide that a copyright arbitration royalty panel should consider the

cordings. The inclusion of this exception to the definition of “archived program” is not intended to impose any new license requirement where the broadcast programmer or syndicator grants the webcaster the right to transmit a sound recording, such as may be the case where the sound recording has been specially created for use in a broadcast show.

Subsection 114(j)(4)—“continuous program.” A “continuous program” is one that is continuously performed in the same predetermined order. Such a program generally takes the form of a loop whereby the same set of sound recordings is performed repeatedly; rather than stopping at the end of the set, the program automatically restarts generally without interruption. In contrast to an archived program (which always is accessed from the beginning of the program), a transmission recipient typically accesses a continuous program in the middle of the program. Minor alterations in the program should not render a program outside the definition of “continuous program.”

Subsection 114(j)(6)—“eligible nonsubscription transmission”. An “eligible nonsubscription transmission” is one that meets the following criteria. First, the transmission must be noninteractive and nonsubscription in nature. Second, the transmission must be

mining the royalty rate for such subscription service. The conferees do not intend that the ability to offer such sample channels be used as a means to offer a nonsubscription service under the provisions of section 114 applicable to subscription services. The term "limited number" should be evaluated in the context of the overall service.

norecord it is entitled to make under section 112(a). For example, the conferees understand that a webcaster might wish to reproduce multiple copies of a sound recording to use on different servers or to make transmissions at different transmission rates or using different transmission software. Under section 112(a), as amended by this bill, a webcaster with a section 114(f) statutory license is entitled to make only a single copy of the sound recording. Thus, the webcaster might choose to obtain a statutory license under section 112(e) to allow it to make such multiple copies. The conferees intend that the royalty rate payable under the statutory license may reflect the number of phonorecords of a sound recording made under a statutory license for use in connection with each type of service.

Ephemeral recordings of sound recordings made by certain transmitting organizations under section 112(e) may embody copyrighted musical compositions. The making of an ephemeral recording by such a transmitting organization of each copyrighted musical composition embodied in a sound recording it transmits is governed by existing section 112(a) (or section 112(a)(1) as revised by the Digital Millennium Copyright Act), and, pursuant to that section, authorization for the making of an ephemeral recording is conditioned in part on the transmitting organization being entitled to transmit to the public the performance of a musical composition under a license or transfer of the copyright.

The conditions listed in section 112(e)(1), most of which are also found in section 112(a), must be met before a transmitting organization is eligible for statutory licensing in accordance with section 112(e). First, paragraph (1)(A) provides that the transmitting organization may reproduce and retain only one phonorecord, solely for its own use (unless the terms and conditions of the statutory license allow for more). Thus, trafficking in ephemeral recordings, such as by preparing prerecorded transmission programs for use by third parties, is not permitted. This paragraph provides that the transmitting organization may reproduce and retain more than one ephemeral recording, in the manner permitted under the terms and conditions as negotiated or arbitrated under the statutory license. This provision is intended to facilitate efficient transmission technologies, such as the use of phonorecords encoded for optimal performance at different transmission rates or use of different software programs to receive the transmissions.

Second, paragraph (1)(B) requires that the phonorecord be used only for the transmitting organization's own transmissions originating in the United States, and such transmissions must be made under statutory license pursuant to section 114(f) or the exemption in section 114(d)(1)(C)(iv). Third, paragraph (1)(C) mandates that, unless preserved exclusively for archival purposes, the phonorecord be destroyed within six months from the time that the sound recording was first performed publicly by the transmitting organization. Fourth, paragraph (1)(D) limits the statutory license to reproductions of sound recordings that have been distributed to the public and that are made from a phonorecord lawfully made and acquired under the authority of the copyright owner.

Subsection (e)(3) clarifies the applicability of the antitrust laws to the use of common agents in negotiations and agreements relat-

ing to statutory licenses and other licenses. Under this subsection, the copyright owners of sound recordings and transmitting organizations entitled to obtain the statutory license in this section may negotiate collectively regarding rates and terms for the statutory license or other licenses. This subsection provides that such copyright owners and transmitting organizations may designate common agents to represent their interests to negotiate or administer such license agreements. This subsection closely follows the language of existing antitrust exemptions in copyright law, including the exemption found in the statutory licenses for transmitting sound recordings by digital audio transmission found in section 114(f).

Subsections (e)(4) and (5) address the procedures for determining rates and terms for the statutory license provided for in this section. These procedures are parallel to the procedures found in section 114(f)(2) for public performances of sound recordings by digital audio transmission by new subscription services and services making eligible Nonsubscription transmissions.

Subsection (e)(4) provides that the Librarian of Congress should publish notice of voluntary negotiation proceedings 30 days after enactment of this amendment. Such voluntary negotiation proceedings should address rates and terms for the making of ephemeral recordings under the conditions of this section for the period beginning on the date of enactment and ending on December 31, 2000. This subsection requires that a minimum fee be established as part of the rates and terms.

In the event that interested parties do not arrive at negotiated rates and terms during the voluntary negotiation proceedings, subsection (e)(5) provides for the convening of a copyright arbitration royalty panel to determine reasonable rates and terms for the making of ephemeral recordings under this subsection. This paragraph requires the copyright arbitration royalty panel to establish rates that reflect the fees that a willing buyer and seller would have agreed to in marketplace negotiations. In so doing, the copyright arbitration royalty panel should base its decision on economic, competitive and programming information presented by the parties, including, but not limited to, such evidence as described in subparagraphs (A) and (B).

Subsection (e)(7) states that rates and terms either negotiated or established pursuant to arbitration shall be effective for two-year periods, and the procedures set forth in subsections (e)(4) and (5) shall be repeated every two years unless otherwise agreed to by the parties.

The conferees intend that the amendments regarding the statutory licenses in sections 112 and 114 contained in section 415 of this bill apply only to those statutory licenses.

SECTION 406. ASSUMPTION OF CONTRACTUAL OBLIGATIONS RELATED TO TRANSFERS OF RIGHTS IN MOTION PICTURES

The Senate recedes to House section 416 with modification.

Paragraph (a)—Assumption of obligations. The conferees have added to paragraph (a) language that defines more specifically the meaning of the “knows or has reason to know” standard in subsection (a)(1). There are three ways to satisfy this standard. The

first is actual knowledge that a motion picture is or will be covered by a collective bargaining agreement. Subparagraph (ii) provides for constructive knowledge, established through two alternative mechanisms: recordation with the Copyright Office or identification of the motion picture on an online web site maintained by the relevant Guild, where the site makes it possible for users to verify their access date in a commercially reasonable way. In order to ensure that the transferee has a reasonable opportunity to obtain the relevant information, these mechanisms for providing constructive notice apply with respect to transfers that take place after the motion picture is completed. They also apply to transfers that take place before the motion picture is completed, but only if the transfer is within eighteen months prior to the filing of an application for copyright registration for the motion picture or, if there is no application for registration, within eighteen months of its first publication in the United States.

The constructive notice established by recordation for purposes of application of this section is entirely separate and independent from the constructive notice established by recordation under section 205(c) of the Copyright Act. This section does not condition constructive notice on prior registration of the motion picture with the Copyright Office, and does not have any bearing on the issue of priority between conflicting transfers as described in section 205(d) of the Copyright Act.

Subparagraph (iii) provides a more general standard for circumstances where the transferee does not have actual knowledge or constructive knowledge through one of the two mechanisms set out in subparagraph (ii), but is aware of facts and circumstances about the transfer that make it apparent that the motion picture is subject to a collective bargaining agreement. Such facts and information might include, for example, budget, location of principal photography, the identity of the talent associated with a project, or the existence of a personal service contract that references terms or conditions of collective bargaining agreements.

Paragraph (b)—Scope of exclusion of transfer of public performance rights.—New paragraph (b) clarifies that the “public performance” exclusion from the operation of paragraph (a) is intended to include performances described in paragraph (b) that reach viewers through transmission or retransmission of programming or program services via satellite, MMDS, cable, and other means of carriage. This paragraph does not expand or restrict in any way what constitutes a “public performance” for any other purpose. The public performance exclusion would not be rendered inoperable simply because a transfer of public performance rights is accompanied by a transfer of limited, incidental other rights necessary to implement or facilitate the exercise of the performance rights.

Paragraph (c)—Exclusion for grants of security interests.—The purpose of this paragraph is to ensure that banks and others providing financing for motion pictures will not be made subject to the assumption of obligations required by this section merely because they obtain a security interest in the motion picture. Because the term “transfer of copyright ownership” is defined in section 101 of the Copyright Act to include a “mortgage . . . or hypothecation” of any exclusive copyright right, this could be the unintended result

of the statutory language. Under this exclusion, a bank or other party would not be subject to the application of paragraph (a) based solely on the acts of taking a security interest in a motion picture, foreclosing on that interest or otherwise exercising its rights as a secured party, or transferring or authorizing transfer of copyright ownership rights secured by its security interest to a third party. Neither would any subsequent transferee downstream from the initial secured party be subject to paragraph (a). The exclusion would apply irrespective of the form or language used to grant or create the security interest.

It should be clear that the only agreements whose terms are enforced by this section are collective bargaining agreements and assumption agreements. In the course of financing a motion picture, a lender, other financier or completion guarantor may execute an inter-creditor or subordination agreement with a union including obligations with respect to the payment of residuals or the obtaining of assumption agreements. Such agreements are not within the scope of this section, and nothing in this section obligates lenders, other financiers or completion guarantors to enter into these agreements, enforces any terms thereof or diminishes any rights that the parties may have under these agreements.

Paragraph (d)—Deferral pending resolution of bona fide dispute. Paragraph (d) allows a remote transferee obligated under paragraph (a)(1) to stay enforcement of this section while there exists a bona fide dispute between the applicable union and a prior transferor regarding obligations under this section. It contemplates that union claims not subject to bona fide dispute will be payable when due under the applicable collective bargaining agreement or through application of this section. Such disputes may be manifested through grievance or arbitration claims, litigation, or other claims resolution procedures in effect between the applicable parties.

Paragraph (e)—Scope of obligations determined by private agreement. Paragraph (e) states explicitly the basic principle of operation of this section. It makes clear that the section simply provides an enforcement mechanism for obligations that have already been agreed to in a collective bargaining agreement. It is not intended to affect in any way the scope or interpretation of the provisions of, or the acts required by, any collective bargaining agreement. The rights and obligations themselves, as well as the remedies

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agreement, the statute does not resolve the dispute. It only requires