

where they have sown. This premise is recognized in the U.S. Constitution's Copyright Clause, Article 1, § 8, cl. 6. It is valid no matter what the medium in which authors' works are fixed and no matter what technology is used to distribute them.

However, the degree of assurance that authors can have about their ability to reap where they have sown depends on the cumulative effect of both legal and practical barriers to unauthorized copying. Accordingly, technological changes

may present new opportunities for authors, but also create additional challenges. Copyright law has had to respond to those challenges, from Gutenberg's moveable type printing press to digital audio recorders. . . .

Report, p. 7. As the Report notes, the first Anglo-Saxon copyright law, England's Statute of Anne, was itself a reaction to the invention of the printing press.

The NII represents a significant change in technology because it makes possible, at a very low cost, the error-free creation of perfect copies of anything storable in digital form, and the delivery of any number of such copies to anyplace in the world, with less work than would be needed to make and deliver an imperfect non-digital copy next door. As the Report notes:

[J]ust one unauthorized uploading of a work onto a bulletin board . . . -- unlike, perhaps, most single reproductions and distributions in the analog or print environment -- could have devastating effects on the market for the work.

Report, p. 10. One reason why the potential effects of the NII's digital transmissions are far greater than the effects of the photocopy machine and analog tape recorder is that analog duplication always results in some degradation in quality. Digital duplication does not. A 500th generation digital copy is indistinguishable from the original. Moreover, digital transmissions can serve as an unpoliceable substitute for passing physical fixations of a work from one person or place to another.

To ensure that technological change does not undermine legal protection of authors (and, in the long run, enrichment of the public domain), the Working Group made the following proposals, incorporated in H.R. 2441 and S. 1284:

- First, to change the definitions of "distribution," "publication," and "importation," and to add a definition of "transmit" a reproduction" to the existing definition of "transmit" a performance," so as to make clear that transmission can be a substitute for passing possession of a physical item from one person to another.

- Second, to provide legal protection to buttress technological protection against copyright violations, by prohibiting importation, manufacture or distribution of devices, products, or services whose primary purpose is to defeat or circumvent technological protection against violation of a copyright owner's exclusive rights
- Third, to prohibit the falsification, removal or alteration of "copyright management information," defined as including the name and other identifying information of the author of a work or its copyright owner, and terms and conditions for the work's use.
- Fourth, to let libraries make some digital copies that they cannot now legally make, by allowing (1) creation of three digital copies of a work as long as no more than one is in use at any time, and (2) creation of digital copies for purposes of preservation something not now permitted.
- Fifth, to create an exemption in favor of the visually impaired allowing non-profit organizations to reproduce and distribute to the visually impaired editions of published literary works when the owner of the distribution right has not entered the market to do so.

The specific language of the proposed legislation might profit from further attention. In some cases, this is because the currently proposed language might be construed in unintended or undesirable ways. In other cases, issues that would be best resolved now may simply have been overlooked. For example, the current definition of "copyright management information" could be read in conjunction with the prohibition against providing false "copyright management information" so as to prohibit authors from using pseudonyms. Yet it is clear that many works have been created under pseudonyms that otherwise might not have been. There is no reason why technological change should bar an author from using a pen-name, as a price for having protection on the NII. A similar issue exists regarding designations of corporate origin when a corporation is not the "author" under the work-for-hire doctrine.

Another potential area where the proposed legislation might benefit from clarification arises because works made accessible online could, under the legislation, be considered "published" if they are considered distributed "to the public." Such works would then be subject to the mandatory deposit requirements of 17 U.S.C. § 407. Application of mandatory deposit requirements to databases that are made available only online, many of which change in content daily or even more frequently, would pose severe practical problems which merit attention and resolution during the legislative process.

Moreover, for all works in digital form deposited with the Library of Congress, how will the Library ensure that these works are not duplicated by patrons of the Library without authorization? A similar concern arises with respect to the proposed new grant of permission to libraries and archives to make up to three digital copies for certain purposes. The legislation ultimately enacted should make it very clear that the proper purposes of such digital copies are strictly limited to preservation or replacement under 17 U.S.C. § 108(b) and (c), and that they do not become a source of further unauthorized reproduction (for example, via additional copies given to patrons).

The proposed exemption for the visually impaired, while proffered in support of a laudable goal, also could benefit from additional attention to its wording. For instance, proposed section 108A fails to extend the exemption it creates to the Library of Congress's National Library Service for the Blind and the Physically Handicapped (NLS) -- perhaps because the section was modeled on an Australian law -- and fails to track the terminology of existing U.S. law addressed to the same goal of helping the blind, namely the Copyright Act's existing Section 710. Thus, where Section 710 refers to "blind and physically handicapped," proposed section 108A refers to "visually impaired," and where Section 710 refers to materials "specially designed for the use of" beneficiaries, proposed section 108A uses the language "intended to be perceived by." Such differences could have unintended substantive effects. Such issues merit further refinement, as the Working Group itself seems to have conceded in footnote 562 to its Report.

S. 1284's and H.R. 2441's proposal of a criminal penalty for circumventing copyright management information in violation of proposed section 1202, but not for circumvention of copyright protection systems in violation of proposed section 1201, is unexplained in the Report. This may be because the Report's discussion regarding criminal offenses focuses on the problem raised by *U.S. v. LaMacchia*, 871 F. Supp. 635 (D. Mass. 1994). However, providing a criminal penalty for violation of proposed section 1201 would be consistent with the Report's discussion at pages 233-234 of existing provisions regarding criminal penalties under the Copyright Act, 17 U.S.C. § 1002, the Communications Act, 47 U.S.C. § 605(e)(4), and NAFTA. It thus seems that a criminal penalty should be provided for violation of proposed section 1201.

Finally, the proposed section 1203 would give a court powers to order the seizure and "the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator." These remedies are potentially far reaching. For example, security-breaching systems could be software run on a "normal" computer. An order for destruction of the security-breaching "system" might be read to mean the destruction of the computer itself. This would not make sense if the security-breaching software was placed on a company's expensive mainframe computer by an employee, without the company's knowledge, let alone consent. Thus, the seizure and destruction provisions of proposed section 1203(b)(2) and (6) might best be modified to indicate that a court should strongly prefer remedial modification, and resort to seizure or destruction only in situations where remedial modification would not be practical or just.



February 15, 1996

February 15, 1996

Congressman Moorehead
Chairman, Subcommittee on
Courts and Intellectual Property
2138 Rayburn House Office Building
Washington, DC 20515-6216

RE: HR 2441

Dear Congressman Moorehead:

Thank you very much for requesting my written comments on the above referenced bill.

This is a very important piece of legislation and I want to thank you for taking the initiative of introducing this bill to Congress. I feel that the bill is necessary and will benefit copyright owners greatly in their ability to defend their copyrighted works posted on the internet without authorization, particularly by including "transmission" within the definitions of publication and distribution.

There is one point that has not been addressed which we cannot ignore and that is the role and responsibility of the access provider in regards to infringements posted on the Internet through his system. There must be some responsibility of the access provider should infringing material be posted through his system. It would be unfair to make the service provider responsible for any infringing material posted through his system as monitoring this amount of material would not be feasible and how would he know if the material was infringing or not?

7851 Hollywood Boulevard, Suite 403, Hollywood, California 91605
Telephone: 213-466-3313 Fax: 213-466-4747 Key: 098121 John Susskind

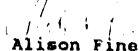
However, if the access provider is notified that there is infringing material on his system and he is shown reasonable evidence in this respect i.e. a registration certificate for the work or copies of the work showing a valid copyright notice, then he should be required to remove the offending material from the system at the request of the copyright owner.

It would have to be clearly defined what is meant by "access provider" and what would be considered sufficient notice that the material is infringing on valid copyrights. It would be unfair to wait for a court to decide as in the meantime, millions of copies of the material are being posted internationally. Such requirements would have to be within the scope of instant removal upon notification, pending further investigation and possible litigation.

The above are my comments and I hope they prove helpful. I would appreciate being info'd on any future correspondence, etc. relating to this very important piece of legislation, including scheduled hearings on the matter.

Thank you again for your time and energy put into this proposed legislation and addressing this serious situation of copyright protection on the Internet.

Sincerely,


Alison Fine
Director of Legal Affairs



Consumer Federation of America

February 15, 1996

The Honorable Carlos J. Moorhead, Chairman
House Courts and Intellectual Property Subcommittee
B-351A Rayburn Building
Washington, DC 20515

Re: Comments on H.R. 2441

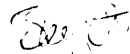
Dear Chairman Moorhead:

We appreciate your request for comments on the NII Copyright Protection Act of 1995. As we have stated before, we believe any changes in copyright laws must keep in mind not only the interest of the works' creator, but that of the public at large.

Consumer Federation of America is a member of the Digital Future Coalition. CFA's views and concerns about the above referenced legislation are contained in the written testimony that is being filed today by a number of members of the coalition.

CFA hopes you and your committee will consider our concerns carefully and proceed with caution on this critically important consumer issue for the information age.

Very truly yours,



Bradley Stillman
Telecommunications Policy Director

The **NHA** National Humanities Alliance

FEB 20 1996

February 15, 1996

The Honorable Carlos J. Moorhead
Chairman
Subcommittee on Courts and Intellectual Property
2346 Rayburn Building
Washington, DC 20515


Dear Congressman Moorhead:

I write on behalf of the 85 organizations comprising the National Humanities Alliance (NHA) to thank you for the invitation to submit written testimony on the NII Copyright Protection Act of 1995. NHA welcomes and appreciates the opportunity to participate in the process by which the legislation is formulated and your leadership in steering Congress toward a balanced and fair bill for both copyright owners and users.

NHA is a member of the Digital Future Coalition (DFC), a diverse, broad-based coalition of 27 national organizations representing educators, librarians, technology companies, consumers, and creators. We have been participating in the development of the DFC written testimony being submitted today. We believe that our concerns with the pending legislation are fully expressed in the DFC testimony and therefore request that you treat it as representing the views of NHA.

My colleagues and I look forward to working with you and your staff on issues that affect scholarship and other activities related to the humanities and copyright law.

Sincerely yours,



John Hammer
Director

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Internet: nhainfo@nha.org

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February 20, 1996

The Honorable Carlos J. Moorhead
Subcommittee on Courts and
Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
2346 Rayburn House Office Building
Washington, DC 20515

Re: NII Copyright Protection Act of 1995

Dear Chairman Moorhead:

To supplement my testimony and to echo the testimony of computer industry members concerning the "NII Copyright Protection Act of 1995," H.R. 2441, as a member of the commercial Internet community and a creator of software products designed for Internet communications, I am pleased to offer the following comments in support of this bill.

This bill is the first step in clarifying copyright protections for work "published" on the existing Internet system and future generation of the Information Infrastructure, regardless of technology. As the first truly cogent legislation to assist content providers on the Internet, this bill warrants the wide industry support it has gained.

The sound reasoning from the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force (the "IITF Paper"), with recommended legislation as modified in this bill, speaks for itself. Critics of this bill wrongly claim that the Copyright Act, as most recently interpreted by the courts, offers sufficient protection for copyright owners as content providers for the Internet. However, there is no good reason to delay legislation declaring that the copyright holder's distribution rights in "transmission" over the Internet and, more importantly, over succeeding generations of the national information highway, is protected. To the contrary—the speed at which all forms of digital communication is growing demands that the property rights provided in the Copyright Act keep pace. This bill provides necessary definition and protection for Internet transmissions, and recognizes the need for technological resources to guard protected works.

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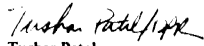
The Honorable Carlos J. Moorhead
 Subcommittee on Courts and
 Intellectual Property
 February 20, 1996
 Page Two

Certainly, we laud modernizing the library exemptions and exemptions for the visually impaired to keep pace with technology. We also believe the additional exemptions contemplated for providers of Internet services discussed but not adopted in the recommendations of the IITF deserve appropriate consideration. In accord with testimony of industry members before your subcommittee, legislation is necessary to absolve Internet service providers of potential liability for unintentional infringement. We agree that the express provisions of this bill suggest that an "innocent" Internet service provider incurs minimal, if any, civil liability and no criminal sanction. The proper analogy for the Internet service provider who neither provides nor controls the content transmitted, but merely delivers communications media, is to the local telephone company who, under local tariff, is responsible for the quantity and quality of service provided—but certainly not responsible to police its content.

As a cogent example of the impossible burden on Internet service providers to control content, the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 223 would (if constitutionally valid) require Internet service providers to police content for merely "indecent" communications. While the CDA would apply a particularly onerous burden, the burden on the service provider to enforce copyright protection today is comparable—the penalty for infringement (or any content-based wrong) should fall only on those intentionally or knowingly assisting in communication, not those providing merely the medium of expression.

Aside from the additional protections for Internet service providers suggested by Representative Boucher, again we are pleased to add our voice to the communications industry participants in favor of the remaining parts of this important bill, particularly in enforcing measures for technological protection of works, ensuring that the United States intellectual property rights keep pace with rapidly expanding Information Infrastructure.

Sincerely,


 Tushar Patel
 President



February 13, 1996

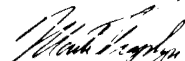
The Honorable Carlos Moorhead
 Subcommittee on Courts and Intellectual
 Property of the House Judiciary Committee
 U.S. House of Representatives
 2346 Rayburn House Office Building
 Washington, D.C. 20515

**Software
 Publishers
 Association**

Dear Chairman Moorhead:

On behalf of the Software Publishers Association, I would like to thank you for holding hearings on the National Information Infrastructure Copyright Protection Act of 1995 (H.R. 2441). We commend you for advancing this important national discussion on the future of the Internet and other interactive telecommunications networks and look forward to working with you and the Subcommittee to ensure passage of this important piece of legislation.

Sincerely,


 Mark Trapkagen
 Counsel, Intellectual Property and
 International Trade Policy

MT/ekb



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February 15, 1996

Rep. Carlos J. Moorhead, Chairman
 Subcommittee on Courts and Intellectual Property
 Committee on the Judiciary
 U.S. House of Representatives
 8351-A Rayburn House Office Building
 Washington, D.C. 20515

Attn: Mitchel Glazier, Counsel

Re: **National Information Infrastructure Copyright Protection Act (H.R. 2441)**

Dear Chairman Moorhead:

In addition to the testimony of Dr. Garry McDaniels of Skills Bank Corporation on February 7, 1996, the Software Publishers Association (SPA) would like to submit additional comments on topics discussed during the Subcommittee's hearings on the National Information Infrastructure Copyright Protection Act (H.R. 2441).

Distribution by Transmission and Prohibition of Circumvention Devices. SPA supports the objective of H.R. 2441 to confirm that transmissions of computer programs are fully protected by copyright. SPA objects to the unfounded assertions by Dr. Cornelius Pingus of the Association of American Universities that H.R. 2441 is "critically unbalanced," and would make footnotes and other citations subject to payment. Dr. Pingus admitted to Rep. Schroeder later in the hearing that these comments were in fact "an extreme reading" of the bill.

SPA also supports the objective of H.R. 2441 to prohibit the importation, manufacture, or marketing of so-called "black boxes" to circumvent technical protection for computer programs. Dr. McDaniels urged Congress to study whether the "primary purpose or effect" test could be made less burdensome for copyright owners, and whether adjusting civil remedies and establishing criminal penalties under appropriate circumstances would provide practical deterrents against these devices and services. SPA would be opposed to measures that would delete the phrase "or effect" from this standard because it would create a loophole for devices whose advertised purpose was not circumvention, but are widely marketed or used to circumvent copyright protection.



Software Publishers Association
 House Judiciary Subcommittee
 February 15, 1996

Conference on Educational and Library Fair Use (CONFU). SPA supports CONFU, and is a member of the CONFU Steering Committee, an ad hoc group of organizations representing libraries and copyright owners that is responsible for planning the agenda and assessing the work plan of the conference. Since September 1994, more than 60 interested organizations representing schools, libraries, and copyright owners have pursued a methodical and exhaustive process to consider over 20 separate topics presented by educational fair use and data communication technologies.

This painstaking work is crucial to winning consensus, and has proved to be the wellspring for two notable accomplishments -- the statutory revisions proposed in the NII Copyright Protection Act (H.R. 2441) for library preservation and exemptions for the blind. As Dr. McDaniels testified, expanding fair use guidelines to permit digital reproduction and network distribution could dramatically affect the business of hundreds of software developers and publishers who market instructional software for K-12, home, special needs, adult, school-to-work, vocational and higher education. As a result, the distribution capabilities of the Internet make agreement on other issues more challenging. Nonetheless, SPA believes that CONFU has created a better understanding of the respective needs of schools, libraries, and copyright owners, their mutual interests, and the potential and pitfalls of the NII.

Online Service Provider Liability. SPA wishes to point out the oral testimony by Steve Heeton was incorrect in asserting that H.R. 2441 would change the copyright liability of online service providers. In fact, H.R. 2441 has no provision affecting the potential liability of online service providers, Internet access providers, and bulletin board services for their own direct infringement or indirect infringement by their subscribers.

As Dr. McDaniels testified, SPA believes that efforts to alter their liability are premature. SPA relies on current copyright law -- including liability for indirect infringement -- to protect hundreds of software companies from piracy, and the software industry faces significant new hurdles in fighting software piracy on the information highway. Small to medium sized companies such as Skills Bank cannot afford to monitor the Internet for infringers -- a sentiment echoed by Rep. Bono's observation that songwriters do not want to spend time policing the Internet. SPA is deeply interested in any change in existing law that could make the fight against software piracy more difficult or less effective.

SPA commends the pledge by Mr. Scott Purcell of HLC to work with copyright owners and law enforcement to track down infringers. On the Internet and other networks, software publishers and telecommunications service providers



Software Publishers Association
House Judiciary Subcommittee
February 15, 1995

will be partners, and each should learn to value the contribution the other will make to success on the Internet. SPA cannot agree with Mr. Purcell's assertion, however, that "pirates are easy to track." In fact, the SPA antipiracy program has found that detecting and pursuing software piracy on the Internet and other networks is very difficult.

SPA appreciates this opportunity to offer these additional views on H.R. 2441, and would be pleased to answer any questions the Subcommittee may have.

Sincerely yours,

Mark Traphagen
Counsel

Enclosure: Five Copies

cc: Dr. Garry L. McDaniels, Skills Bank Corporation

TIME WARNER

Arthur B. Seckler, Esq.
Vice President-Law
and Public Policy

February 15, 1996

The Honorable Carlos Moorhead
Chairman
Subcommittee on Courts and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Time Warner very much appreciates your invitation to comment for the record on H.R. 2441, the NII Copyright Protection Act of 1995. Time Warner supports this important legislative effort and encourages the Subcommittee's continued focus on it. With some refinements which we will touch upon below, Time Warner believes that H.R. 2441 would provide necessary clarifications to the copyright law in order to adapt it successfully to the unique circumstances presented by the teeming communications and marketplace potential of cyberspace.

Time Warner is one of the world's leading media and entertainment companies, with interests in magazine and book publishing, recorded music and music publishing, filmed entertainment, broadcasting, theme parks, cable television and cable television programming. Through its large holdings of copyrighted works, Time Warner has the potential to be a substantial supplier of content to the National Information Infrastructure.

But Time Warner already is more than a content provider for the Internet. We operate one of the most popular sites on the World Wide Web, Pathfinder, which is experiencing an average of 27 million "hits," or communications contacts, a week. We also are providing Internet access through our cable television company in Elmira, New York, a venture known as Linerunner. And, finally, we have a completely interactive, switched digital video, voice and data "Full Service Network" in place in Orlando, Florida, currently serving approximately 4,000 customers.

It is our view that the principles that first guided the Administration's Working Group on Intellectual Property Rights in its landmark White Paper on "Intellectual Property and the National Information Infrastructure," and have been carried forward into your legislation, Mr. Chairman, are very sound indeed. We wholeheartedly endorse the sense that the American tradition of strong intellectual property protection must be extended to the NII, and that the Copyright Act, with some adjustments, is quite adequate to deal successfully with the new digital environment. With strong copyright protection we, and no doubt other content providers, would

