at a rapid pace in the past two years, is far from a unified body of law. A significant conflict between two recent cases in the on-line liability area adds further confusion to this already muddled area.

In the case of Playboy Enterprises, Inc. v. Frena, the court held that the mere fact that the defendant operated a bulletin board service was all that was required to find infringement -- "it does not matter that Defendant Frena may have been unaware of the copyright infringement." 839 F. Supp. 1552, 1559 (M.D. Fla. 1993)(emphasis added). This case has been widely criticized and rejected by subsequent cases as contrary to established law, but may now in fact be resurrected by the strict liability policy endorsed by the White Paper.

On the other hand, the very recent decision of Religious Technology Center v. Netcom On-Line Communication Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995), provided the most detailed analysis of the on-line liability issue to date and rejected the Frena approach. The court in Netcom required the existence of "actual knowledge" and a finding that the Service Provider refused to take action after acquiring such knowledge before contributory infringement can be found. Other cases have since followed. See Religious Technology Center v. F.A.C.T.NET, Inc., 36 U.S.P.Q.2d 1690 (D. Col. 1995); Religious Technology Center v. Lerma, 37 U.S.P.Q.2d (E.D. Va. 1995). It is also important to note that many cases have unfortunately never been fully litigated because the Service Provider settled out of court due to fear of excessive liability. See Frank Music Corp. v. CompuServe, Inc., Civil Action No. 93, Civ. 8153 (S.D.N.Y. 1993); Religious Technology Center v. Lerma, Digital Gateway, et. al, Civil Action No. 95-1107A (E.D. Va. 1995)(internet access provider settled copyright infringement claim).

Content owners, again citing conclusions in the White Paper, have also argued that strict liability for Service Providers should be preserved because the Copyright Act does not provide for significant damage awards and permits the assertion of the "innocent infringement" defense. This argument is irresponsible and does not consider practical business realities. The effect that litigation will have on the emerging Service Provider business cannot be underestimated. The Copyright Act provides for awards of actual damages, including the defendant's profits, statutory

damages and attorney's fees. Proponents of Service Provider liability also fail to mention that many courts have used their discretion to award copyright damages on a per infringement basis. In the digital environment, in which thousands of copies, hence infringements, may be distributed simultaneously at the push of a button, the cumulative effect of these damage awards will be staggering. The multitude of start-up on-line companies, such as the many small internet access companies, would quickly be forced out of business by the costs of defending any continuing copyright litigation.

It is also curious to observe that if the Copyright Act's damage awards were as insignificant as some make them out to be, copyright owners would not have silently accepted these remedies since the inception of the 1976 Copyright Act as recompensation for wrongs committed. The availability of the "innocent infringer" defense is also of little comfort to a Service Provider community which will be facing an onslaught of litigation. It is important to note that the defense does not affect a court's finding of liability, but only the amount of damages awarded by the court. Also unmentioned are the huge financial resources, increased costs, disruptions and corresponding bad will which will inevitably result among Service Providers, users and content owners from these misdirected and unnecessary lawsuits.

It is also entirely reasonable to assume that the amount of litigation in this area will increase significantly in the future. The need for H.R. 2441 is based on certain premises, one of which is that the NII will not grow unless new legislation is created to encourage copyright owners to place their copyrighted "crown jewels" on the NII. See Prepared Statement of Jack Valenti, Chairman and CEO, MPAA. The corollary to this premise is that the increased placement of "crown jewels" on the NII will certainly result in a corresponding increase in litigation resulting from unauthorized uses of such works. The complexities of liability issues, including the determination of when and how a Service Provider receives actual knowledge, could be litigated and remain unresolved for years. Just as content owners would not accept a "wait and see" approach on the issue of placing their valuable content on the NII, likewise, the "wait and see" solution in the area of Service Provider liability would clearly be irresponsible and cause immense

damage to this equally important and emerging line of business.

Why Resolving the Liability Dilemma Will Clarify and Fairly Balance Service Provider and Content Owner Responsibilities

It has been argued that Service Providers should not be given relief from liability because such relief would allow the Service Provider to "avoid responsibility" or create an "incentive for ignorance." It was asked at the hearings, "Who will be responsible?" We would argue that under a balanced system of copyright law, both content owners and Service Providers may have differing but equally important responsibilities with respect to enforcing, protecting and deterring infringements. It should be made clear that Bell Atlantic and other Service Providers merely seek legislative relief from misdirected liability and certainly support taking whatever good faith reasonable steps are necessary to discourage or prevent infringement. Bell Atlantic promotes good, responsible corporate citizenship for itself and others and endorses copyright management information systems, copyright education for the public and other technical means of deterring infringement, including the use of encryption.

In an attempt to seek an amicable resolution of this issue, Bell Atlantic, along with a broad group of telecommunications companies, internet access providers and on-line service providers, drafted a legislative proposal, which was discussed by Congressman Boucher at the recent hearings. This proposal was intended to serve as a starting point for good faith discussions between Service Providers and content owners, with the intention of reaching a prompt and mutually acceptable resolution to the on-line liability issue. The proposal seeks relief from liability for those entities who, with respect to a particular infringing act, solely provide the access or connection to a facility, system or network not under the Service Provider's control. For all other Service Providers, the proposal clarifies the issue of contributory infringement by codifying the actual knowledge standard recognized by many, including the court in the Netcom decision, as a prerequisite to liability. At the hearings on H.R. 2441, content owners, including Jack Valenti, testifying on behalf of MPAA, stated that "no court has ever found an on-line Service Provider guilty except where the provider participated or was actually

aware of the infringing activity." Although the case law in this area suggests otherwise, a codification of the actual knowledge standard will go a long way in clarifying the boundaries of liability.

As Stephen Heaton, General Counsel for CompuServe testified at the hearings, the failure to address the issue of liability will actually result in a wholesale shifting of all responsibility for policing and enforcing violations of copyright from the copyright owner to the Service Provider. Given the technical realities of digital, real-time on-line services, Service Providers will not, except in rare cases, be in a position to assess whether a particular transmission is a violation of copyright law. If for example, a user of an on-line service transmits to another user an Ansel Adams photograph, which he or she then digitally alters into a new photograph, the Service Provider, in the absence of actual knowledge of infringement from the copyright owner, must somehow bear omniscient responsibility for determining that (1) this particular file out of thousands transmitted that day contains a suspicious digital photograph, which the Service Provider must translate from binary code to visual form in order to read; (2) such photograph is a valid and subsisting copyrighted work of Ansel Adams; (3) the digitally altered work was an unauthorized derivative work that violates the copyright law; and (4) there are no defenses to the user's transmission of this work, including fair use, copyrightability, public domain issues, parody or license rights, to name a few. It is clear that the issue of "responsibilities" is not clean cut and cannot be used as a means of usurping the traditional role of a judicial tribunal in providing substantive analyses of complex copyright infringement disputes.

The argument that the Service Provider somehow seeks to avoid responsibility is further complicated by a general lack of awareness that potential conflicts may arise between the responsibilities content owners would like Service Providers to take under the copyright law and potential violations of other laws and regulations. One witness at the hearings used the example in his testimony that a Service Provider was informed of infringing material attached to an e-mail message and took no action to remove it. Service Providers, including Bell Atlantic, certainly would like to cooperate with content owners to the extent they can to prevent and remedy infringements. Few realize, however, that the Service Provider,

by even opening an electronic e-mail message, could be in violation of the Electronic Communications Privacy Act or various other laws, including state privacy statutes. Likewise, actions taken to cut off service to a user because of a copyright violation, could, in certain instances, violate the common carrier obligations that the Service Provider must follow under other laws and regulations. In such situations, the Service Provider may be in the untenable position of violating either the Copyright Act or other federal and state laws or regulations, which could invoke additional liabilities and even criminal penalties.

Bell Atlantic welcomes the opportunity to sit down and work out a prompt resolution of this issue with content owners. It should be made clear that the former discussions held between content owners and Service Providers, which content owners referred to in the hearings as an excuse for delaying this issue, did not in any way discuss or seek a resolution on the issue of liability. Nor is it likely that the issue will be resolved without legislative efforts and involvement. If the liability issue is not addressed in H.R. 2441, it is unlikely that content owners will ever relinquish the enviable position of being able to sue the deep pocket Service Provider for each and every infringement regardless of actual knowledge without any corresponding responsibilities of their own. If we are to truly address the far-reaching copyright issues surrounding the development of the NII, we must balance the concerns of owners, Service Providers and users and get this legislation right the first time.

SINCERELY,

SARAH DEUTSCH
(FOR) BELL ATLANTIC CORPORATION

Creative Incentive Coalition

February 15, 1996

Supporters Include:

Association of American Publishers
Association of Independent Television Stations
Business Software Alliance
Cox Enterprises, Inc
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McGraw-Hill, Inc
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Recording Industry Association of America
Software Publishers Association
Time Warner Inc
Times Mirror Co
Turner Broadcasting System, Inc
Viacom Inc
West Publishing Co

Kenneth R. Key, Executive Director

The Honorable Carlos Moorhead, Chairman
The Honorable Patricia Schroeder, Ranking Minority Member
Subcommittee on Courts and Intellectual Property
U.S. House of Representatives
B-351A Rayburn House Office Building
Washington, DC 20515

RE: H.R. 2441, NII Copyright Protection Act

Dear Chairman Moorhead and Mrs. Schroeder:

The Creative Incentive Coalition (CIC) appreciates this opportunity to submit its comments for the record of the recently concluded hearings on H.R. 2441, the NII Copyright Protection Act.

CIC is a broad-based copyright industry coalition which supports strong copyright protection for works on the National and Global Information Infrastructure. A list of CIC members is attached.

CIC strongly supports the thrust of H.R. 2441, and commends you for your leadership in introducing the bill and conducting timely and comprehensive hearings on it. This legislation proceeds from two premises with which CIC fully agrees:

First, strong protection for intellectual property is essential if the full potential of the National Information Infrastructure is to be realized;

Second, current copyright law, with a few important amendments, works well to provide that protection.

H.R. 2441 provides the needed "digital update" to the Copyright Act. Its prompt enactment will send a powerful message, both within the United States and throughout the global marketplace, that respect for intellectual property is a fundamental "rule of the road" on the information superhighway. Modernization of our law will provide a valuable model to other countries, and to international organizations such as the WIPO, as they grapple with the challenge of adapting copyright norms to the Global Information Infrastructure.

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The NII Copyright Protection Act will also help stimulate research and development on new technology to protect copyrighted works from infringement, and on new systems to facilitate and automate the management of copyrights, in the advanced, digital network environment. Finally, enactment of this important legislation will give a strong boost to efforts to educate members of the public -- in their roles as consumers, students, researchers, business people, and citizens -- in the importance of respect for copyright.

As Chairman Moorhead noted at last week's hearings, the copyright industries play an increasingly important role in the U.S. economy, and are a major export earner for the U.S., racking up a substantial positive balance of trade. Digital networks offer an exciting opportunity for even broader and more efficient distribution of the fruits of American creativity, both here and around the world. But the same technological advances that open up these new opportunities also underscore the vulnerability of our copyright industries to new forms of piracy and other abuses of intellectual property rights. This vulnerability will cloud the bright prospects and undermine the exciting potential of the NII and GII, unless we succeed in using law, technology and public education to promote a more favorable climate for intellectual property in cyberspace. Your legislation is a crucial first step toward advancing that goal.

For all these reasons, we commend the subcommittee for its vigorous efforts to move the legislation forward, and urge you to continue progress toward enactment on an expeditious schedule.

The three hearings held by the subcommittee featured extended discussion on several important issues, some of which we discuss below. While a few of these topics directly concern provisions contained in H.R. 2441, most of them involve issues that the sponsors originally chose -- wisely, in our view -- not to address in legislative form at this time. CIC commends you for looking into these issues, and in urging proponents to come forward with specific proposals for amendments, in legislative language, as soon as possible. We look forward to reviewing any such proposals and hope that you will call upon us if we can assist you in evaluating them. In the meantime, we are pleased to offer the following comments:

1. Online Service Provider Liability

Even before the release of the Administration's White Paper which formed the basis of H.R. 2441, CIC identified the critical importance of this issue. Many CIC members are deeply involved in the online service industry, either as operators of services and/or as content providers who use these services to distribute material to growing markets. Furthermore, we have long recognized that content owners and online service providers (OSPs) have a strong common interest in promoting respect for intellectual property in the online networked environment, and a common goal of preventing copyright infringement on networks to the greatest practical extent.

Spurred by this recognition, CIC reached out more than six months ago to the leading association representing the major commercial OSPs -- the Interactive Services Association -- and began a dialogue with them on issues of mutual concern. We have held several lengthy meetings, which we believe have been informative and useful to participants on both sides of the table. Besides CIC members and the major commercial OSPs, such as CompuServe, American Online and Prodigy, participants have included representatives from AT&T, MCI, Bell Atlantic, Netcom, and the Commercial Internet Exchange. Our discussions have covered a broad range of complex issues. Most recently ,we have focused on a proposed joint statement of principles, covering topics such as education, training, parameters of responsibility, complaint handling, hyperlinking and pointing, e-mail and chat rooms, enforcement cooperation, and technological means; and on a detailed proposal for a mutually agreeable protocol on OSP handling of infringement complaints submitted by copyright owners.

While we would be glad to provide you or your staffs with more details about these discussions, the foregoing should suffice to demonstrate that the copyright community has been neither dilatory nor passive with regard to discussion of this important issue. Nor have we "rebuffed" participation by any interested party, although we did make the decision that the discussions would have a greater chance of success if they began with ISA, a broadly representative group whose interests with regard to this legislation are nevertheless intensely focused on the OSP liability issue.

CIC welcomes the suggestion, made by several members of the subcommittee, that it is time to open up this ongoing discussion to other participants with a stake in the outcome, and to conduct it henceforth under the sponsorship and guidance of your subcommittee. Whether this takes place under the auspices of a formal commission, as suggested by Representative Goodlatte during the hearings, or whether the discussions are conducted more informally through the good offices of subcommittee staff or of an expert agency such as the Copyright Office, we are ready, willing, and able to move the discussions to a new forum. We are also prepared to begin this new phase of discussions immediately and to proceed on an expeditious timetable. At the same time, we encourage the subcommittee to move ahead with prompt action on the important statutory changes that would be made by H.R. 2441, which should not be delayed even if the subcommittee-sponsored dialogue on this topic has not reached a resolution. This course of action would be fully consistent with your viewpoint, expressed at the hearing, on the importance of timely action by the U.S. to blaze the policy trail for copyright in the new networked environment.

2. Prohibition on Protection Circumvention Devices/Services (Section 1201)

As Congress takes the first steps along the road toward adapting copyright law to the digital networked environment, few missteps could be more dangerous than failing to provide copyright owners with adequate legal tools to protect and enforce their rights. New technology offers