

THE WIPO COPYRIGHT TREATIES IMPLEMENTATION ACT

HEARING

BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION
OF THE
COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

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ON

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(ii)

CONTENTS

	Page
Testimony of:	
Byrne, Chris, Director, Intellectual Property, Silicon Graphics, Inc	30
Callas, Jonathan, Chief Technology Officer, Network Associates, Inc	27
Greenstein, Seth, on behalf of the Digital Media Association	58
Holleyman, Robert W., II, President and CEO, Business Software Alliance	36
Hinton, Walter H., Vice President, Strategy and Marketing Enterprise Operations, Storage Technology Corporation, on behalf of the Computer and Communications Industry Association	46
Metalitz, Steven J., Smith & Metalitz, L.L.P., on behalf of the Motion Picture Association of America	53
Oakley, Robert L., Library Director, Georgetown University Law Center ..	63
Phelps, Charles E., Provost, University of Rochester, on behalf of the Association of American Universities	70
Rosen, Hilary B., President and CEO, Recording Industry Association of America	42
Rotenberg, Marc, Director, Electronic Privacy Information Center	12
Shapiro, Gary J., Chairman, Home Recording Rights Coalition and, President, The Consumer Electronics Manufacturers Association	18
Vradenburg, George, III, Senior Vice President and General Counsel, America Online, Inc., on behalf of the Ad Hoc Copyright Coalition	50
Material submitted for the record by:	
Belinsky, Mark, prepared statement on behalf of Macrovision Corporation	113
Broadcast Music, Inc	116
Institute for Electronic Engineers, prepared statement of	115

(iii)

THE WIPO COPYRIGHT TREATIES IMPLEMENTATION ACT

FRIDAY, JUNE 5, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2123, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Oxley, Schaefer, Stearns, Klug, Deal, White, Rogan, Shimkus, Bliley (ex officio), Markey, Boucher, Gordon, Sawyer, Eshoo, Klink, Wynn, McCarthy, and Dingell (ex officio).

Staff present: Justin Lilley, majority counsel; Mike O'Rielly, legislative analyst; Cliff Riccio, legislative clerk; and Andy Levin, minority counsel.

Mr. TAUZIN. The committee will please come to order. We will ask our guests to take the seats so we can get organized.

Good morning. Article I, Section 8 of the Constitution provides: "Congress shall have power... to promote the progress of science and useful arts, by securing for limited times to authors and inventors exclusive right to their respective writings and discoveries." Article I, Section 8 also provides that Congress shall have the right to regulate commerce among the foreign nations and the several states. And that is why we are here today, to strike a balance between these two constitutional directives.

In the Information Age, the concept of copyright and intellectual property law is a keystone to developing electronic commerce. Just as oil and gas law defined the growth of that industry in that age, so too must intellectual property law keep pace with the technological developments of today, such as the Internet and the electronic commerce that is so rapidly expanding. Indeed, as technology changes and converges, the law must do so as well, and that is the foundation and core mission of the WIPO treaties.

The subcommittee meets this morning to take testimony relating to H.R. 2281, the WIPO Copyright Treaties Implementation Act. This bill was favorably reported by the House Judiciary Committee by voice vote just a few weeks ago. In addition, the Senate has also considered and overwhelmingly approved a similar bill by a vote of 99 to nothing. What an extraordinary act by the other body. These actions indicate the policy goals of the bill are generally sound.

(1)

The principle of copyright is buried deep within the moral fiber of American society. Just as it is wrong to steal the physical property of another, it is equally wrong to steal the creative ideas of another without providing acknowledgment and, in most instances, remuneration to the creator of the work. The copyright is basically a code of conduct that prevents users from stealing the creative property of others. Those whose work is often tied to ideas and concepts is also included within tangible goods, such as consumer products.

Historically, copyright law has provided creators of copyright work with the exclusive right to distribute their own work. One exception to this general principle is the doctrine of fair use, which recognizes there is a benefit to allowing the public the use of copyrighted work under certain circumstances. This unique balance has worked well in the past and should in fact be the basis for policy into the future digital age. As we move this bill, we must maintain indeed this delicate balance between the competing sides of this debate to ensure neither flourishes at the other's expense. And if this bill favors the copyright community, consumers, manufacturers, users of copyright work, and society as a whole may in fact suffer. Similarly, if the bill favors the users of copyright work, then creativity might be stifled in some respect. Today we start the committee's examination as to whether the bill draws this necessary balance into policy.

The timing of the debate before us, of course, is important. As the committee continues its effort to examine issues relative to electronic commerce, examining how copyright law interacts with electronic commerce is an important facet of that discussion. As electronic commerce develops, we as policymakers must indeed establish clear policy for consumers, network and hardware providers, and copyright owners which protects the integrity and value of electronic commerce. Today we will consider and debate the worthiness of legislation to enact additional copyright law relative to electronic communications in networks.

Accordingly, let me take a moment to thank Chairman Bliley and his staff for their efforts to ensure that the Commerce Committee indeed had a chance to take up this bill in this hearing today. There are particular reasons why this committee is rightly suited to consider the issues before us. First, we are charged by the House, and by the House rules, with jurisdiction over telecommunication matters and we have an obligation to do so and we intend to make sure that duty is carried out. More importantly, the members of the Commerce Committee and the members of this subcommittee, have unique expertise on technology issues which is unparalleled in the House or other committees. Legislation of this nature indeed should be considered by members of this committee.

I want to welcome the extraordinary panel we assembled this morning. Our panels seem to be getting bigger and bigger and bigger as the electronic industry and the whole technology and communications expands, and I want to thank you for agreeing to attend in such a large measure for us to educate us on this treaty.

Let me also mention something that was in the news today that I think will be of particular interest to all the members of the subcommittee. Apparently, 17-year-old hackers were able to com-

promise the integrity of the Indian nuclear science program, indicating, again, how critical it is that security in the world of the Internet and in commerce and in matters as sensitive as nuclear programs are critical, and, again, indicating why the work of this committee, in promoting adequate encryption and security and privacy in the exploding area of Internet services is a critical work for this Congress, and I wanted to call that to the members' attention because it again indicates how small the community of this world has become with the explosion of the Internet onto the global surface.

Let me again thank you all for being a part of this learning experience for us, and the Chair will now yield to—Mr. Markey is not here. I will yield to Mr. Boucher for an opening statement for the minority.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I also want to congratulate Chairman Bliley and his staff for their very excellent and successful effort to make sure that H.R. 2281 received consideration by the Committee on Commerce. And I would like to thank you, Chairman Tauzin, for scheduling the hearing today on a subject that is of great importance to the users of information, from libraries to universities, to individuals and their places of work, and in their homes, and to the manufacturers and users of consumer electronics products.

Let me say at the outset that we all share a deep-seated commitment to protect from piracy the intellectual property rights of American creators of movies, books, records and computer software. No nation on Earth exhibits the creative genius that is found here in the United States, and these works contribute richly to our domestic economy and to our balance of trade.

There is no debate about the need to afford adequate protection from theft to creative works. I would also acknowledge that in the digital network environment these works are at greater risk than before. Digital reproduction enables copying without degradation, and the Internet enables the rapid dissemination of information from a single source to numerous recipients. And so I think it is appropriate that new legislation be adopted to address these new concerns. And I share the desire of copyright owners to have those protections put in place. But it is essential that we legislate these new protections for copyright owners in a manner that is narrowly targeted to achieve the intended purpose and in a manner that does not undermine traditional fair use principles. Nor should we impede the introduction of useful new technology that has multiple uses, some of which could be put to copyright infringing purposes.

Unfortunately, H.R. 2281, as reported from the House Judiciary Committee, does not meet that test. It intrudes greatly upon the established doctrine of fair use, to the detriment of libraries, universities and potentially every American citizen. Its new copyright liability provisions are so broad and so poorly defined that it will hinder the willingness of manufacturers of equipment to introduce much useful new consumer technology. For example, the bill prohibits and imposes felony punishment on any circumvention of a technological protection measure. This provision is truly astonishingly broad. The circumvention does not have to be for the purpose

of infringing a copyright for the prohibitions and the criminal penalties of that provision to apply.

We will hear from witnesses this morning some of the many unacceptable consequences that arise from this poorly drafted provision.

In my group of proposed amendments, there is a simple remedy that would only punish circumvention when the circumvention occurs for the purpose of infringing a copyright. That amendment would adequately and fully protect the interests of the copyright owner, and at the same time, allow circumventions to take place where today they occur for legitimate uses and occur under the provisions of today's application of fair use principles.

The bill imposes liability on the manufacturers and sellers of consumer products, which can make copies, if it is determined that their primary intent was for the purpose of copyright infringement. Manufacturers will not know in advance of the litigation how their intent ultimately will be judged when their products have multiple potential uses. Even though their actual intent would be for legitimate uses of their technology, their willingness to introduce the new devices will be chilled by the potential of broad copyright liability that is imposed in a manner that is not knowable at the time that they design and produce and put into the market their new technology.

Another of the amendments that I am suggesting would address that concern by qualifying the primary intent test and by assuring manufacturers that they will not be held to a standard that requires their devices to accommodate what will be hundreds of technological protection measures, many of which will be incompatible with others. And so through the amendment, I am suggesting we would not be requiring manufacturers to do something that is technically impossible, and that is accommodate all of these disparate and internally inconsistent technological protection measures.

My suggested amendments also address user concerns through these approaches, by enabling distance learning to employ digital platforms for data transmission, as well as the closed circuit analog TV platforms that are in use today and that are sanctioned by today's copyright law, making lawful under the copyright law the ephemeral copies of material that are made on a user's computer when that user browses the World Wide Web, by firmly implanting the first sale doctrine into the digital era, by reaffirming the doctrine of fair use, by permitting libraries and other repositories of information to make an appropriate number of archival copies of the works so that education and research can be facilitated.

Mr. Chairman, I very much hope for the subcommittee's favorable consideration of this set of narrowly drawn and well targeted amendments that will achieve the kind of balance that you refer to in your opening statements, and I very much look forward to the testimony of today's witnesses.

Mr. TAUZIN. I thank my friend.

The Chair is now pleased to recognize the chairman of the full committee, the honorable gentleman from Richmond, Virginia, Mr. Bliley.

Chairman BLILEY. Thank you, Mr. Chairman.

In 1948, George Orwell published his now famous novel, 1984. The book told of a society ruled by Big Brother, who appeared into all of our lives through a telescreen. The book's fundamental premise was that technology would ruin democratic society. Today, 50 years after the book's publication, we now know that Orwell was wrong, dead wrong. Technology is a democratizing force. It enriches us, it educates us and it provides equal opportunity. The digital revolution is a liberating force in the Internet; personal computers and other consumer electronics devices are the tools we use to get a view of the world.

Pending before the Committee on Commerce and the subject of today's hearing is one of the most important technology-related bills of the 105th Congress, H.R. 2281, the WIPO implementing legislation. We are here today to discuss, whether, as some argue, this legislation would limit technological innovation and thereby deny us the promise of technology. Copyright holders insist, however, it is only through enactment of this legislation that authors will feel secure in releasing their works into the digital environment, thus facilitating technological innovation.

One can see immediately that this debate will not be settled easily, but we intend to try and I speak for all the members when I say we could use the help of all of the interested parties. I therefore urge all of you to redouble your efforts over the course of the next several weeks to try and resolve these outstanding issues. Otherwise, we will proceed without the benefit a nongovernmental resolution.

Meanwhile, let me say that we need to understand precisely what impact this legislation will have on the, quote, fair use doctrine. Educators and researchers rely on fair use to enrich all of us. Consumers rely on it as well. And I know these groups have concerns with the legislation. We therefore need to explore whether the anti-circumvention provisions reach too broadly, as my colleague from Virginia just pointed out.

In the end, the Commerce Committee will do what it does best, we will add value to this bill. We will be adding value to a familiar subject, telecommunications communications and information technology. The committee is in the process of a wide ranging review of electronic commerce. This hearing is thus very timely, and it is an important component of the committee's inquiry into electronic commerce.

Mr. Chairman, I want to commend you for assembling this distinguished panel of witnesses. I look forward to working with you and the other members of the subcommittee.

Mr. TAUZIN. I thank the chairman.

The Chair is now pleased to recognize the ranking minority member, the gentleman from Michigan, Mr. Dingell, for an opening statement.

Mr. DINGELL. Thank you, Mr. Chairman. I commend you for holding this important hearing today on H.R. 2281, the WIPO Copyright Treaties Implementation Act. Questions involved in this legislation are very intimately involved in the broad jurisdiction of this committee over the general subject of telecommunications, and I am pleased that you are inquiring into this matter.

