

Ms. WILLIS. I know that there are artists, whose work and whose concerts are on the Internet via Webcasts, and I am sure they are getting compensated. Other than the fact that those performances usually occur on the record company's site, so that may be viewed as just promotion.

Mr. COBLE. It thank the gentleman. Gentlelady from California.

Ms. LOFGREN. For the professor. I have read your testimony with great interest because you have addressed issues that really others have not.

On page 2 of your written testimony you express anxiety, I guess, about the potential to require online service providers to essentially monitor their communication in order to avoid liability. And you also on page 4 express concern about the need to impose prior censorship as well as an elimination of due process in making determinations.

Could you give me some examples? Are you concerned that e-mail would be monitored, or is it more the Use Net type of situation? Specifically, what are you concerned about, and would a good encryption technology resolve your concerns?

Mr. COBLE. And professor, if you could do this quickly.

Zoe, how about the response by mail? Would you mind doing that?

Ms. LOFGREN. I bet he can do it in under 30 seconds.

Mr. COBLE. All right, go ahead professor.

Mr. OAKLEY. I think we do not have too much concern about monitoring e-mail, but we do have concern about having to monitor the Web sites of all of our students, or all of the users who might use a library platform as an arm ramp to the Internet. And if they build Web sites there and so on; if we have to monitor those that—

Ms. LOFGREN. That is not a privacy issue because the Web site is meant to be seen.

Mr. OAKLEY. Well, that is true. But we would have to go in ahead of time to ensure our own protection, and make sure that we agree that it was okay.

Ms. LOFGREN. I get it.

Mr. OAKLEY. So it is sort of prior censorship kind of problem.

Ms. LOFGREN. I get it.

Mr. OAKLEY. Actually, I am troubled—and here is I guess where I get challenged by the 30 seconds. But I am troubled by the encryption technology, because I have a strong feeling that that is liable to tip the balance very strongly, the copyright balance that has been built so carefully—tip the balance very strongly in favor of copyright owners. I do not know where fair use comes into that. I do not know where the library exemptions come into that. And so I do worry about the encryption technology if it is not balanced.

Ms. LOFGREN. Or watermarking and takedown.

Mr. COBLE. Folks, pardon my anxiety. We are in a hurry. I thank you all for being here.

This concludes the testimony for today. The Subcommittee will stand in recess until 10:00 a.m. tomorrow morning in this room.

[Whereupon, at 4:28 p.m., the Subcommittee was adjourned.]

H.R. 2281, WIPO COPYRIGHT TREATIES IMPLEMENTATION ACT; AND H.R. 2180, ONLINE COPYRIGHT LIABILITY LIMITATION ACT

WEDNESDAY, SEPTEMBER 17, 1997

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to call, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Howard Coble (chairman of the subcommittee) presiding.

Present: Representatives Coble, Bono, McCollum, Canady, Frank, Conyers Berman, Boucher, Lofgren, and Delahunt.

Staff Present: Mitch Glazier, Chief Counsel; Eunice Goldring, Staff Assistant; Robert Raben, Minority Counsel; and Stephanie Peters, Minority Counsel.

Mr. COBLE. Folks, we are going to try to start in a timely way. I had planned to just have my opening statement and Mr. Frank's opening statement, but the gentleman from Virginia insisted that he give an opening statement, so I will recognize the gentleman from Virginia at this time. We have to clear this room by 1:30 today. The full Judiciary Committee will meet at this time.

So the gentleman from Virginia is recognized for 5 minutes.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I greatly appreciate the Chair's indulgence in permitting Members to offer opening statements. I think that is an important part of our process, and I want to extend my appreciation to the Chair for permitting that to occur during the course of this hearing.

Mr. Chairman, in his testimony yesterday Commissioner Lehman confirmed that the adoption of a punishment for the manufacturer of devices such as general purpose computers and recorders is not necessary for the implementation of the WIPO treaty. He correctly stated that the United States could take an entirely different and, I think, more positive approach by adopting legislation that does not punish the manufacturer of devices, but instead punishes conduct that is directly tied to the active infringement.

In fact, the subcommittee should know that the WIPO Convention which drafted the treaty rejected language which would have required punishment of the manufacturer of devices. Such a proposal was, in fact, put forth by the Finnish delegate Mr. Liedes, who was given responsibility for preparing the initial draft of the WIPO treaty. He headed what was known as the committee of experts, and that committee under his leadership proposed to the

WIPO Conference that—an approach that would punish the manufacturer of devices be included.

Opposition to the device-oriented approach was expressed by numerous countries, and as a result the device-oriented approach was abandoned. It is not required by the treaty. And yet the device-oriented approach, which was rejected at the Geneva conference, has now resurfaced and is at the core of the administration's recommendation for implementation of the WIPO treaty. That approach is also at the core of the legislation that is presently pending before the subcommittee.

I share the concerns about the approach which punishes the manufacturer of devices which were voiced by many nations in the Geneva conference. The language embodied in the implementing bill would effectively overturn the long-settled law of the United States as announced by the Supreme Court in its BetaMax decision. In that case the Court held that the manufacturer of a device is not subject to suit under the copyright law if the device has a single substantial noninfringing use notwithstanding the presence of infringing uses. Using that rationale, the Court held that Sony was not liable for manufacture of the BetaMax VCR even though the VCR was on occasion used for the purpose of infringing copyrights. The fact that the VCR had noninfringing uses, such as time shifting and the recording of programs, the recording of which was fully authorized under the copyright law, was enough to sanction that device and render the manufacturer not liable under the copyright law.

That case is the state of our law today with respect to devices that have both infringing and noninfringing uses. It is that subtle law which the treaty implementing the bill now before the subcommittee, the bill that is before the subcommittee, would effectively overturn. If that bill becomes law, the equipment manufacturers would become liable in instances where their devices had legitimate uses. The consequence, I fear, would be a reluctance to bring promising new technology to market or to continue the manufacture of existing technology that has potential infringing uses.

What is needed, Mr. Chairman, is a more thoughtful approach, one clearly contemplated by the WIPO convention which rejected the device-oriented approach, one consistent with well-settled American copyright law, and one that will not inhibit the manufacture and sale of information technology. During the next several weeks it is my intention to offer as legislation that better approach. It will not punish the manufacturers of information appliances. Instead it will punish the people who infringe copyrights by their act of circumventing anticopy protections. Not only is this approach consistent with the WIPO treaty's requirements, as Mr. Lehman confirmed yesterday, but it is much more in keeping with traditional notions of copyright protection in the United States.

I also intend to take the opportunity of the introduction of this bill to address several other important concerns. The bill would make it clear that the fair use doctrine applies with full force in the digital environment. The measure would also address the concerns of libraries and educators and consumers of literary products by offering assurances of the applicability of the first sale doctrine in the digital environment, and it will be—and it will fully author-

ize educators to use dated networks for distance learning in the same manner in which they are presently using broadcast television and closed-circuit television for those same purposes.

Mr. Chairman, I appreciate your patience in permitting the offering of this opening statement, and I commend these subjects to the subcommittee for their consideration and will look forward to discussing these various issues with Members during the coming weeks.

[The information follows:]

PREPARED STATEMENT OF CONGRESSMAN RICK BOUCHER

As the testimony of Commissioner Lehman yesterday confirmed, the adoption of a punishment for the manufacturers of devices such as general purpose computers and recorders, is not necessary for the implementation of the WIPO treaty. He correctly stated that the United States could take an entirely different and I think more positive approach by adopting legislation that does not punish the manufacture of devices, but instead punishes conduct tied to the act of infringement.

In fact, the Subcommittee should know that the WIPO convention which drafted the treaty rejected language which would have required punishment of device manufacturers. Such an approach was offered by the Finnish delegate, Mr. Liedes, who was given responsibility for preparing the initial draft of the treaty.

Opposition to the device-oriented approach was expressed by numerous countries and as a result, the device-oriented approach was abandoned. It is not required by the treaty.

And yet, the device-oriented approach having been rejected at Geneva by the treaty conference, has now resurfaced and is at the core of the legislation proposed by the Administration to implement the treaty. It is the approach taken by the bill now pending before the Subcommittee.

I share the concerns about the approach which punishes device manufacturers which were voiced by many nations in the Geneva conference. The language embodied in the implementing bill would effectively overturn the long settled law of the United States as announced by the Supreme Court in its Betamax decision.

In that case, the Court held that the manufacturer of a device is not subject to suit under the copyright law if the device has a single substantial non-infringing use notwithstanding the presence of infringing uses. Using that rationale, the Court held that Sony was not liable when the Betamax VCR was used to record programs in a manner that infringed copyrights. The VCR had non-infringing uses and the manufacturer was not liable.

That case is the state or our law today with respect to devices which have both infringing and non-infringing uses. It is that settled law which the treaty implementing bill now before the Subcommittee would effectively overturn.

If the bill becomes law, equipment manufacturers will become liable in instances where their devices have legitimate uses. The consequence, I fear, will be a reluctance to bring pioneering new technology to market or even to continue the manufacture of existing technology that has potential infringing uses.

What is needed, Mr. Chairman, is a more thoughtful approach, one clearly contemplated by the WIPO convention which rejected the device-oriented approach, one consistent with well-settled American law and one that will not inhibit the manufacture and sale of information technology.

During the next several weeks, it is my intention to offer as legislation that better approach. It will not punish the manufacturers of information appliances. Instead, it will punish the people who infringe copyrights by their act of circumventing anticopy protections.

Not only is this approach consistent with the WIPO treaty's requirements, as Mr. Lehman confirmed yesterday, but it is much more in keeping with traditional notions of copyright protection in the United States.

I also intend to take the opportunity of the introduction of the bill to address several other important concerns:

(a) The bill will make it clear that the Fair Use doctrine applies with full force in the digital environment.

(b) The measure will also address the concerns of libraries and educators by offering assurances of the applicability of the First Sale doctrine in the digital environment.

(c) It will also fully authorize educators to use data network for distance learning in the same way that they now use broadcast and closed circuit television for that purpose.

I will look forward to discussing this new and I think better approach to WIPO treaty implementation with Subcommittee members.

Mr. COBLE. Howard, how long will yours be?

Mr. BERMAN. Not as long.

Mr. COBLE. We have a vote on the floor in a couple of minutes. Could you do it?

Mr. BERMAN. Yes.

Mr. COBLE. We have a vote on the floor.

Now let's hear from the gentleman from California. Then we will stand in recess while we go vote and return.

Gentleman from California.

Mr. BERMAN. Thank you very much, Mr. Chairman.

On the issue of Betamax, I will wait until after the panel has testified to make what I think are compelling distinctions between the Betamax analogy and what is attempted to be done in this legislation with respect to anticircumvention protection. Although the analogy on conduct versus the manufacturer, some might argue, is a little bit like going after the street pusher and ignoring the drug kingpin, but I think that is too harsh a comparison, and so I wouldn't make that. But all I wanted to do is read into the record a response to yesterday's testimony by Roy Neel where he said that the Frena case puts our industry at risk.

The Techs Warehouse bulletin board, operated by George Frena, was the subject of a case that so threatened the U.S. telephone industry, Playboy Enterprises, Inc., v. Frena. The stock in trade—Mr. Chairman, I realize it is going to take me a little bit longer. It is going to take me 2 minutes to read this. I don't know if you wanted—

Mr. COBLE. Why don't you suspend, and then we will stand in recess and return from the floor as soon as we can.

[Brief recess.]

Mr. COBLE. The gentleman from California is recognized to continue his opening statement.

Mr. BERMAN. Mr. Chairman—wherever you are, Mr. Chairman, I am the only person who could lose my opening statement between the starting of it and the finishing of it, and I have this paragraph that was going to be precise, and so I thought I would read it. And since I—oh, it has appeared.

I just wanted to give a little clarification to a comment made yesterday by the representative of the United States Telephone Association, where, after a lot of questioning, the one case that came out that was bothersome to him was Playboy Enterprises v. Frena, and I just wanted to take a minute to describe it.

The Techs Warehouse bulletin board, which was operated by George Frena, was the subject of the case that so threatens the U.S. telephone industry. The stock in trade of this electronic bulletin board system was computerized copies of photographs, many of them described by the court as adult subject matter. These included 170 copies of photos taken from 50 editions of Playboy magazine. Frena claimed that these photos were uploaded by BBS users, not by him, and the district court acknowledged that Frena himself may have been unaware of the copyright infringement.

However, the court also noted that the images on Frena's system, while, quote, essentially exact copies, end of quote, of Playboy's originals had one key difference: Playboy's, quote, text, including its trademark, was removed from the photographs, and Defendant Frena's name, Techs Warehouse BBS, and telephone numbers were placed, end of quote, in its stead. As summarized in the opinion, Playboy's trademarks were obliterated from the photographs, and then Defendant Frena attempted to take credit for plaintiff's work by placing its own advertisement with its own phone number on some of the photographs.

These findings appear in the portion of the opinion explaining why Frena was guilty of trademark infringement and unfair competition. The court did not consider them relevant to the copyright infringement issue; however, they certainly negate Frena's claim that he did not know the material was an infringement of copyright when it was uploaded to his system, so that the case that we are told puts the telephone company at risk did not involve a telephone company, did not involve a party who had no participation in making infringing material available over a computer network, and did not involve a party who lacked actual knowledge of the infringing material.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

