

Mr. Shapiro.

Mr. SHAPIRO. The electronics industry holds more patents than any other industry every year at the Patent and Trademark Office, and speaking like patent owners, what this legislation could cause is some real trouble, because you come up with a copyright protection scheme that is patented. You convince one copyright owner to institute it. All of a sudden you have a mandatory license that every technology product owner has to pay you. It is a money-making scheme, perhaps, for patent owners, and, I mean, obviously legislation like this will never finally emerge because it is so absurd, but that is the consequence of this type of legislation.

Mr. BOUCHER. Mr. Belinsky, I have one question of you. Does the Macrovision technology still depend upon there being an automatic gain control on the VCR for it to be effective?

Mr. BELINSKY. A portion of the technology depends on the automatic gain control circuitry that is in just about all—

Mr. BOUCHER. So let me ask you a question. Let's suppose that somebody wanted to manufacture a VCR without an automatic gain control. Isn't it possible that that VCR, once distributed, could subject the manufacturer to liability under this section as being designed to circumvent your anticopy protection technology?

Mr. BELINSKY. I think I would agree with you that if that product was brought to market, it would circumvent our technology. Whether it would be the primary use of that product, I am not sure I am—

Mr. BOUCHER. I would just suggest that is a pretty good example of the kind of technology that could fall on a very gray area and might be produced for a very legitimate purpose, but the production of it might well impose liability under this very and, I think, too broad section.

Mr. Chairman, my time is expired. Thank you for your indulgence.

Mr. BELINSKY. Mr. Boucher, could I add one observation related to the point that you made, and also related to a point that Mr. Ryan made earlier this morning in the previous set of discussions, and that is that it seems to me that your perspective on intellectual property and protecting it might be slightly different if your intellectual property is completely intangible, as it is in the case of a video producer, as compared to the situation where you might have a lot of intellectual property supporting your products on the marketplace, but that the product is delivered in a tangible form, and that that might be one reason why some folks are much more concerned about technological protection measures as relates to allowing them to gain the fair benefit from their creative works.

Mr. BYRNE. My final comment on that is that we are content providers, ITI has enormous software development and content providing in its midst, and we are all in this together. We should not be fighting each other.

Mr. COBLE. The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman.

I think this has been a very healthy and useful discussion, and I think there is some truth that we see the world from where we are sitting. And that is good because we need all the viewpoints, and in a way, Mr. Byrne, that was why I was especially interested

in your comments, because in addition to your role here on behalf of the association, you are also from Silicon Graphics, and SGI does all sorts of joint ventures with Hollywood and so has something of a stake in that world and then a stake in the computer hardware world and the like.

I read through your proposed substitute for section 1201. I am wondering if you could very briefly describe what you think your language does that improves upon the language in the draft legislation that we are looking at. Could you review that with us?

Mr. BYRNE. Well, again, I think what it does is it gives us some certainty.

Ms. LOFGREN. Specifically in what way does it do that?

Mr. BYRNE. The way it is currently drafted, those three prongs of that test are very kind of open-ended, and at the end of the day, you know, you are really going to capture everything that qualifies under the third paragraph, which is something that's just being merely marketed for circumventing. That's kind of broad, and that's really going to capture a lot.

So we are again—I mean, somebody could develop and design and sell something perfectly legitimate, and somebody else is going to market that thing to circumvent a protection scheme. Well, that is bad, and we agree that is bad.

Ms. LOFGREN. Well, let me ask you this question: What if in the language of the draft bill, subsection C was simply struck? Could you then distinguish in a way that is persuasive to us your substitute language? Is there anything else?

Mr. BYRNE. You are getting better. I mean, the ideal situation is one where you know, again, let's make sure that our engineers who are trying to push boundaries can really identify, you know, what—

Ms. LOFGREN. No, I understand I am for pushing boundaries, but I am trying to get specific as to your proposed language.

Mr. BYRNE. Yeah, it is—if you change those "ors" to "ands" so that all three of those things have to happen, then we are happy.

Ms. LOFGREN. Let me ask you this, Mr. Bennett: Your testimony has been very helpful today, and I appreciate all the panel, as well as the preceding panel, for sharing their expertise with us.

In your earlier discussion some time ago now, there was a discussion of fair use and the need for libraries have to buy a copy anyhow just as they do now. And in my personal experience, of all the groups that are scrupulous about living within copyright rules, schools and libraries are foremost. But isn't it possible technologically to avoid the first sale doctrine? For example, could you not digitally produce something in a way that you would have to pay a per access fee, so you could buy one, but you would only be able to buy one view of something. Is that technologically feasible?

Mr. BENNETT. Absolutely. I am glad you mentioned that because we have been focusing very much on anticircumvention, and there are a lot of other issues—fair sale is one, fair use is as another, distance education is another, digital preservation is yet another—that I think we need to address in implementing the treaties and bringing copyright law up to date.

Ms. LOFGREN. Well, I could argue both sides of this because we do want the first sale doctrine. On the other hand, in the digital

world, you can have the first sale and then make that available to a kazillion people.

Mr. BENNETT. That would be inconsistent for the spirit of first sale, so we wouldn't want to do it that way. We need some way to bring first sale as it exists today into the digital environment.

Ms. LOFGREN. Do you have a suggestion on how to do that?

Mr. BENNETT. We could provide you with a suggestion on that.

Ms. LOFGREN. Finally, and this has been a long hearing, and we are down to just a hardy few, I did note your comments, Mr. Black, about the inconsistency in the administration's view on encryption in this arena as compared to its Big Brother takes over the world encryption policy. I am wondering if you would like to address that issue for the remaining Members.

Mr. BLACK. Yes. I thought because there is the committee's involvement, it is worth mentioning. We do think that if you really approach encryption and this issue and keep them in perspective and together, that the idea of limiting the use of technology which is vital to the encryption process, the ability to encrypt, it makes no sense.

The administration's approach on encryption is to basically try to—I suppose there is a parallel in that they try to bottle up technology in both areas here, devices in 1201 on the one hand and encryption technology on the other. But I have a tough time understanding the consistency in the reaction to decryption products and technology. On the one hand, in essence, they are saying law enforcement should have—there should be no secure encryption out there in essence, everybody has got to build this stuff in, and their approach which is saying absolutely no exceptions, and anything which could be used to provide access would be illegal—

Ms. LOFGREN. And so if I may—

Mr. BLACK [continuing]. Create their back-door—

Ms. LOFGREN. Just to make sure I understand because although I did some programming a long time ago, I am no longer a programmer or person capable of doing that, but there are many who believe that the proposal being put forward on encryption will really allow skillful people to—not just the FBI, but it is creating opportunities for anybody who is very good at hacking to break into what otherwise would be secure, and so that if I am hearing you correctly, if we were to adopt the administration's draft bill, we would be making sure that people who complied with their proposal on encryption would also be violating the law.

Mr. BLACK. I didn't hear all of that, but I think I am—we are on the same page.

Ms. LOFGREN. Thank you, Mr. Chairman.

Mr. CONYERS. Mr. Chairman, could I suggest while you are in the chair, that we commit to a whole further hearing in Hollywood, if that is possible.

Mr. BONO. You want to go to the big show?

Mr. CONYERS. I think we are ready.

Mr. BONO. Okay.

Mr. CONYERS. And then finally I wanted to greet warmly all of the ex-staffers and ex-Congressmen who are here today and yesterday for these very important hearings.

Thank you very much, Mr. Chairman.

Mr. BONO. Thank you.

I thank the witnesses for their testimony. The subcommittee very much appreciates their contribution.

This concludes our hearings of these bills. The record will remain open for 1 week. Thank you for your cooperation. The subcommittee stands adjourned.

[Whereupon, at 1:30 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIALS SUBMITTED FOR HEARING

STATEMENT OF BEHALF OF THE GRAPHIC ARTISTS GUILD BY DANIEL ABRAHAM, VICE-PRESIDENT FOR PUBLIC AFFAIRS

The Graphic Artists Guild:

Opposes limiting the copyright liability of on-line service providers as contrary to the fundamental Constitutional intent of copyright law to protect the rights of creators;

Opposes limiting the copyright liability of on-line service providers because they are adequately protected under existing law;

Opposes limiting the copyright liability of on-line service providers to the extent that they lay unilateral claim, by terms of service or otherwise, to copyright in works posted on or transmitted by on-line services;

Supports holding on-line service providers and their subscribers accountable for the unactionable infringements enabled by the distribution of copyrighted works over on-line networks;

Opposes limiting the copyright liability of on-line service providers to the extent that such limitation removes the incentive for on-line service providers to assist and participate in the dissemination of copyright education to the general public.

THE GRAPHIC ARTISTS GUILD

The Graphic Artists Guild promotes and protects the economic interests of its members. It is committed to improving conditions for all creators of graphic art and raising standards for the entire industry. The Guild is a union that embraces creators of graphic art at all levels of skill and expertise, producing work intended for presentation as originals or reproductions.

Graphic artists create a wide variety of intellectual property: company and product logos; illustrations for media and advertising; posters for political and sales campaigns; merchandise in the apparel, home decorative and stationery markets; and computer graphics which enhance and drive the digital marketplace.

Graphic artists have already suffered from infringements caused or facilitated by on-line service providers (see Appendix A), and are particularly vulnerable to further injury without relief if the On-Line Copyright Liability Limitation Act passes.

THE PROPERTY RIGHTS OF CREATORS MUST BE SAFEGUARDED

The Constitutional authorization for copyright protection in Article I, §8 mandates safeguarding the rights of creators, for their own benefit and for the public interest. The Copyright Act is designed to protect the rights of creators in their work, and the rights of successor interests; licensees, purchasers and heirs. Any alteration of liability for infringement must be measured against this standard; unless the effect is the better protection of creators' rights, the alteration is contrary to the legislative history and intent of the copyright law.

This bill proposes to shield a specific class of business from copyright liability in the course of its distribution or transmission of copyrighted work. It does not address the threat which such distribution may pose to the protection of creators' rights. In failing to do so, such an alteration in liability threatens the constitutionally-mandated incentives intended to foster the creative process.

ON-LINE SERVICE PROVIDERS PROTECTED BY EXISTING LAW

On-line service providers are common carriers to the extent that they simply engage in secondary transmissions, providing their subscribers with an avenue for the interchange of their primary transmissions. Carriers engaging solely in the passive transmission of copyrighted work are exempt from liability under §111(a)(3) of the

