

In the Senate of the United States,

September 17, 1998.

Resolved, That the bill from the House of Representatives (H.R. 2281) entitled “An Act to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.”, do pass with the following

AMENDMENT:

Strike out all after the enacting clause and insert:

1 SECTION 1. SHORT TITLE.

2 *This Act may be cited as the “Digital Millennium*
3 *Copyright Act of 1998”.*

4 SEC. 2. TABLE OF CONTENTS.

Sec. 1. Short title.

Sec. 2. Table of contents.

TITLE I—WIPO TREATIES IMPLEMENTATION

Sec. 101. Short title.

Sec. 102. Technical amendments.

Sec. 103. Copyright protection systems and copyright management information.

Sec. 104. Conforming amendment.

Sec. 105. Effective date.

*TITLE II—INTERNET COPYRIGHT INFRINGEMENT LIABILITY**Sec. 201. Short title.**Sec. 202. Limitations on liability for Internet copyright infringement.**Sec. 203. Conforming amendment.**Sec. 204. Liability of educational institutions for online infringement of copyright.**Sec. 205. Effective date.**TITLE III—COMPUTER MAINTENANCE OR REPAIR**Sec. 301. Limitation on exclusive rights; computer programs.**TITLE IV—EPHEMERAL RECORDINGS; DISTANCE EDUCATION;
EXEMPTION FOR LIBRARIES AND ARCHIVES**Sec. 401. Ephemeral recordings.**Sec. 402. Limitations on exclusive rights; distance education.**Sec. 403. Exemption for libraries and archives.*

1 **TITLE I—WIPO TREATIES**
 2 **IMPLEMENTATION**

3 **SEC. 101. SHORT TITLE.**

4 *This title may be cited as the “WIPO Copyright and*
 5 *Performances and Phonograms Treaties Implementation*
 6 *Act of 1998”.*

7 **SEC. 102. TECHNICAL AMENDMENTS.**

8 *(a) Section 101 of title 17, United States Code, is*
 9 *amended—*

10 *(1) by deleting the definition of “Berne Conven-*
 11 *tion work”;*

12 *(2) in the definition of “The ‘country of origin’*
 13 *of a Berne Convention work”, by deleting “The ‘coun-*
 14 *try of origin’ of a Berne Convention work,” capital-*
 15 *izing the first letter of the word “for”, deleting “is the*
 16 *United States” after “For purposes of section 411,”,*

1 and inserting “a work is a ‘United States work’ only”
2 after “For purposes of section 411,”;

3 (3) in paragraph (1)(B) of the definition of “The
4 ‘country of origin’ of a Berne Convention work”, by
5 inserting “treaty party or parties” and deleting “na-
6 tion or nations adhering to the Berne Convention”;

7 (4) in paragraph (1)(C) of the definition of “The
8 ‘country of origin’ of a Berne Convention work”, by
9 inserting “is not a treaty party” and deleting “does
10 not adhere to the Berne Convention”;

11 (5) in paragraph (1)(D) of the definition of “The
12 ‘country of origin’ of a Berne Convention work”, by
13 inserting “is not a treaty party” and deleting “does
14 not adhere to the Berne Convention”;

15 (6) in paragraph (3) of the definition of “The
16 ‘country of origin’ of a Berne Convention work”, by
17 deleting “For the purposes of section 411, the ‘country
18 of origin’ of any other Berne Convention work is not
19 the United States.”;

20 (7) after the definition for “fixed”, by inserting
21 “‘The ‘Geneva Phonograms Convention’ is the Conven-
22 tion for the Protection of Producers of Phonograms
23 Against Unauthorized Duplication of Their
24 Phonograms, concluded at Geneva, Switzerland on
25 October 29, 1971.”;

1 (8) after the definition for “including”, by in-
2 serting “An ‘international agreement’ is—

3 “(1) the Universal Copyright Convention;

4 “(2) the Geneva Phonograms Convention;

5 “(3) the Berne Convention;

6 “(4) the WTO Agreement;

7 “(5) the WIPO Copyright Treaty;

8 “(6) the WIPO Performances and Phonograms
9 Treaty; and

10 “(7) any other copyright treaty to which the
11 United States is a party.”;

12 (9) after the definition for “transmit”, by insert-
13 ing “A ‘treaty party’ is a country or intergovern-
14 mental organization other than the United States that
15 is a party to an international agreement.”;

16 (10) after the definition for “widow”, by insert-
17 ing “The ‘WIPO Copyright Treaty’ is the WIPO
18 Copyright Treaty concluded at Geneva, Switzerland,
19 on December 20, 1996.”;

20 (11) after the definition for “The ‘WIPO Copy-
21 right Treaty’”, by inserting “The ‘WIPO Performances
22 and Phonograms Treaty’ is the WIPO Performances
23 and Phonograms Treaty concluded at Geneva, Swit-
24 zerland on December 20, 1996.”; and

1 (12) by inserting, after the definition for “work
2 for hire”, “The ‘WTO Agreement’ is the Agreement
3 Establishing the World Trade Organization entered
4 into on April 15, 1994. The terms ‘WTO Agreement’
5 and ‘WTO member country’ have the meanings given
6 those terms in paragraphs (9) and (10) respectively
7 of section 2 of the Uruguay Round Agreements Act.”.

8 (b) Section 104 of title 17, United States Code, is
9 amended—

10 (1) in subsection (b)(1), by deleting “foreign na-
11 tion that is a party to a copyright treaty to which
12 the United States is also a party” and inserting
13 “treaty party”;

14 (2) in subsection (b)(2) by deleting “party to the
15 Universal Copyright Convention” and inserting
16 “treaty party”;

17 (3) by renumbering the present subsection (b)(3)
18 as (b)(5) and moving it to its proper sequential loca-
19 tion and inserting a new subsection (b)(3) to read:

20 “(3) the work is a sound recording that was first
21 fixed in a treaty party; or”;

22 (4) in subsection (b)(4) by deleting “Berne Con-
23 vention work” and inserting “pictorial, graphic or
24 sculptural work that is incorporated in a building or
25 other structure, or an architectural work that is em-

1 *bodied in a building and the building or structure is*
2 *located in the United States or a treaty party”;*

3 *(5) by renumbering present subsection (b)(5) as*
4 *(b)(6);*

5 *(6) by inserting a new subsection (b)(7) to read:*

6 *“(7) for purposes of paragraph (2), a work that*
7 *is published in the United States or a treaty party*
8 *within thirty days of publication in a foreign nation*
9 *that is not a treaty party shall be considered first*
10 *published in the United States or such treaty party*
11 *as the case may be.”; and*

12 *(7) by inserting a new subsection (d) to read:*

13 *“(d) EFFECT OF PHONOGRAMS TREATIES.—Notwith-*
14 *standing the provisions of subsection (b), no works other*
15 *than sound recordings shall be eligible for protection under*
16 *this title solely by virtue of the adherence of the United*
17 *States to the Geneva Phonograms Convention or the WIPO*
18 *Performances and Phonograms Treaty.”.*

19 *(c) Section 104A(h) of title 17, United States Code,*
20 *is amended—*

21 *(1) in paragraph (1), by deleting “(A) a nation*
22 *adhering to the Berne Convention or a WTO member*
23 *country; or (B) subject to a Presidential proclamation*
24 *under subsection (g),” and inserting—*

1 “(A) a nation adhering to the Berne Con-
2 vention;

3 “(B) a WTO member country;

4 “(C) a nation adhering to the WIPO Copy-
5 right Treaty;

6 “(D) a nation adhering to the WIPO Per-
7 formances and Phonograms Treaty; or

8 “(E) subject to a Presidential proclamation
9 under subsection (g)”;

10 (2) paragraph (3) is amended to read as follows:

11 “(3) the term ‘eligible country’ means a nation,
12 other than the United States that—

13 “(A) becomes a WTO member country after
14 the date of enactment of the Uruguay Round
15 Agreements Act;

16 “(B) on the date of enactment is, or after
17 the date of enactment becomes, a nation adhering
18 to the Berne Convention;

19 “(C) adheres to the WIPO Copyright Trea-
20 ty;

21 “(D) adheres to the WIPO Performances
22 and Phonograms Treaty; or

23 “(E) after such date of enactment becomes
24 subject to a proclamation under subsection (g).”;

1 (3) in paragraph (6)(C)(iii), by deleting “and”
2 after “eligibility”;

3 (4) at the end of paragraph (6)(D), by deleting
4 the period and inserting “; and”;

5 (5) by adding the following new paragraph
6 (6)(E):

7 “(E) if the source country for the work is
8 an eligible country solely by virtue of its adher-
9 ence to the WIPO Performances and Phonograms
10 Treaty, is a sound recording.”;

11 (6) in paragraph (8)(B)(i), by inserting “of
12 which” before “the majority” and striking “of eligible
13 countries”; and

14 (7) by deleting paragraph (9).

15 (d) Section 411 of title 17, United States Code, is
16 amended—

17 (1) in subsection (a), by deleting “actions for in-
18 fringement of copyright in Berne Convention works
19 whose country of origin is not the United States
20 and”; and

21 (2) in subsection (a), by inserting “United
22 States” after “no action for infringement of the copy-
23 right in any”.

1 (e) Section 507(a) of title 17, United States Code, is
 2 amended by adding at the beginning, “Except as expressly
 3 provided elsewhere in this title,”.

4 **SEC. 103. COPYRIGHT PROTECTION SYSTEMS AND COPY-**
 5 **RIGHT MANAGEMENT INFORMATION.**

6 Title 17, United States Code, is amended by adding
 7 the following new chapter:

8 **“CHAPTER 12—COPYRIGHT PROTECTION AND**
 9 **MANAGEMENT SYSTEMS**

“Sec.

“1201. Circumvention of copyright protection systems.

“1202. Integrity of copyright management information.

“1203. Civil remedies.

“1204. Criminal offenses and penalties.

“1205. Savings Clause.

10 **“§ 1201. Circumvention of copyright protection sys-**
 11 **tems**

12 “(a) VIOLATIONS REGARDING CIRCUMVENTION OF
 13 TECHNOLOGICAL PROTECTION MEASURES.—(1) No person
 14 shall circumvent a technological protection measure that ef-
 15 fectively controls access to a work protected under this title.

16 “(2) No person shall manufacture, import, offer to the
 17 public, provide or otherwise traffic in any technology, prod-
 18 uct, service, device, component, or part thereof that—

19 “(A) is primarily designed or produced for the
 20 purpose of circumventing a technological protection
 21 measure that effectively controls access to a work pro-
 22 tected under this title;

1 “(B) *has only limited commercially significant*
2 *purpose or use other than to circumvent a techno-*
3 *logical protection measure that effectively controls ac-*
4 *cess to a work protected under this title; or*

5 “(C) *is marketed by that person or another act-*
6 *ing in concert with that person with that person’s*
7 *knowledge for use in circumventing a technological*
8 *protection measure that effectively controls access to a*
9 *work protected under this title.*

10 “(3) *As used in this subsection—*

11 “(A) *to ‘circumvent a technological protection*
12 *measure’ means to descramble a scrambled work, to*
13 *decrypt an encrypted work, or otherwise to avoid, by-*
14 *pass, remove, deactivate, or impair a technological*
15 *protection measure, without the authority of the copy-*
16 *right owner; and*

17 “(B) *a technological protection measure ‘effec-*
18 *tively controls access to a work’ if the measure, in the*
19 *ordinary course of its operation, requires the applica-*
20 *tion of information, or a process or a treatment, with*
21 *the authority of the copyright owner, to gain access*
22 *to the work.*

23 “(b) *ADDITIONAL VIOLATIONS.—(1) No person shall*
24 *manufacture, import, offer to the public, provide, or other-*

1 *wise traffic in any technology, product, service, device, com-*
2 *ponent, or part thereof that—*

3 “(A) *is primarily designed or produced for the*
4 *purpose of circumventing protection afforded by a*
5 *technological protection measure that effectively pro-*
6 *tects a right of a copyright owner under this title in*
7 *a work or a portion thereof;*

8 “(B) *has only limited commercially significant*
9 *purpose or use other than to circumvent protection af-*
10 *forded by a technological protection measure that ef-*
11 *fectively protects a right of a copyright owner under*
12 *this title in a work or a portion thereof; or*

13 “(C) *is marketed by that person or another act-*
14 *ing in concert with that person with that person’s*
15 *knowledge for use in circumventing protection af-*
16 *forded by a technological protection measure that ef-*
17 *fectively protects a right of a copyright owner under*
18 *this title in a work or a portion thereof.*

19 “(2) *As used in this subsection—*

20 “(A) *to ‘circumvent protection afforded by a*
21 *technological protection measure’ means avoiding, by-*
22 *passing, removing, deactivating, or otherwise impair-*
23 *ing a technological protection measure; and*

24 “(B) *a technological protection measure ‘effec-*
25 *tively protects a right of a copyright owner under this*

1 *title’ if the measure, in the ordinary course of its op-*
2 *eration, prevents, restricts, or otherwise limits the ex-*
3 *ercise of a right of a copyright owner under this title.*

4 *“(c) OTHER RIGHTS, ETC., NOT AFFECTED.—(1)*
5 *Nothing in this section shall affect rights, remedies, limita-*
6 *tions, or defenses to copyright infringement, including fair*
7 *use, under this title.*

8 *“(2) Nothing in this section shall enlarge or diminish*
9 *vicarious or contributory liability for copyright infringe-*
10 *ment in connection with any technology, product, service,*
11 *device, component or part thereof.*

12 *“(3) Nothing in this section shall require that the de-*
13 *sign of, or design and selection of parts and components*
14 *for, a consumer electronics, telecommunications, or comput-*
15 *ing product provide for a response to any particular techno-*
16 *logical protection measure, so long as such part or compo-*
17 *nent or the product, in which such part or component is*
18 *integrated, does not otherwise fall within the prohibitions*
19 *of subsection (a)(2) or (b)(1).*

20 *“(d) EXEMPTION FOR NONPROFIT LIBRARIES, AR-*
21 *CHIVES, AND EDUCATIONAL INSTITUTIONS.—(1) A non-*
22 *profit library, archives, or educational institution which*
23 *gains access to a commercially exploited copyrighted work*
24 *solely in order to make a good faith determination of wheth-*
25 *er to acquire a copy of that work for the sole purpose of*

1 *engaging in conduct permitted under this title shall not be*
2 *in violation of subsection (a)(1). A copy of a work to which*
3 *access has been gained under this paragraph—*

4 “(A) *may not be retained longer than necessary*
5 *to make such good faith determination; and*

6 “(B) *may not be used for any other purpose.*

7 “(2) *The exemption made available under paragraph*
8 *(1) shall only apply with respect to a work when an iden-*
9 *tical copy of that work is not reasonably available in an-*
10 *other form.*

11 “(3) *A nonprofit library, archives, or educational in-*
12 *stitution that willfully for the purpose of commercial ad-*
13 *vantage or financial gain violates paragraph (1)—*

14 “(A) *shall, for the first offense, be subject to the*
15 *civil remedies under section 1203; and*

16 “(B) *shall, for repeated or subsequent offenses, in*
17 *addition to the civil remedies under section 1203, for-*
18 *feit the exemption provided under paragraph (1).*

19 “(4) *This subsection may not be used as a defense to*
20 *a claim under subsection (a)(2) or (b), nor may this sub-*
21 *section permit a nonprofit library, archives, or educational*
22 *institution to manufacture, import, offer to the public, pro-*
23 *vide, or otherwise traffic in any technology which cir-*
24 *cumvents a technological protection measure.*

1 “(5) *In order for a library or archives to qualify for*
2 *the exemption under this subsection, the collections of that*
3 *library or archives shall be—*

4 “(A) *open to the public; or*

5 “(B) *available not only to researchers affiliated*
6 *with the library or archives or with the institution of*
7 *which it is a part, but also to other persons doing re-*
8 *search in a specialized field.*

9 “(e) *LAW ENFORCEMENT AND INTELLIGENCE ACTIVI-*
10 *TIES.—This section does not prohibit any lawfully author-*
11 *ized investigative, protective, or intelligence activity of an*
12 *officer, agent or employee of the United States, a State, or*
13 *a political subdivision of a State, or a person acting pursu-*
14 *ant to a contract with such entities.*

15 “(f) *Notwithstanding the provisions of subsection*
16 *(a)(1), a person who has lawfully obtained the right to use*
17 *a copy of a computer program may circumvent a techno-*
18 *logical protection measure that effectively controls access to*
19 *a particular portion of that program for the sole purpose*
20 *of identifying and analyzing those elements of the program*
21 *that are necessary to achieve interoperability of an inde-*
22 *pendently created computer program with other programs,*
23 *and that have not previously been readily available to the*
24 *person engaging in the circumvention, to the extent any*

1 *such acts of identification and analysis do not constitute*
2 *infringement under this title.*

3 “(g) *Notwithstanding the provisions of subsections*
4 *(a)(2) and (b), a person may develop and employ techno-*
5 *logical means to circumvent for the identification and anal-*
6 *ysis described in subsection (f), or for the limited purpose*
7 *of achieving interoperability of an independently created*
8 *computer program with other programs, where such means*
9 *are necessary to achieve such interoperability, to the extent*
10 *that doing so does not constitute infringement under this*
11 *title.*

12 “(h) *The information acquired through the acts per-*
13 *mitted under subsection (f), and the means permitted under*
14 *subsection (g), may be made available to others if the person*
15 *referred to in subsections (f) or (g) provides such informa-*
16 *tion or means solely for the purpose of achieving interoper-*
17 *ability of an independently created computer program with*
18 *other programs, and to the extent that doing so does not*
19 *constitute infringement under this title, or violate applica-*
20 *ble law other than this title.*

21 “(i) *For purposes of subsections (f), (g), and (h), the*
22 *term “interoperability” means the ability of computer pro-*
23 *grams to exchange information, and for such programs mu-*
24 *tually to use the information which has been exchanged.*

1 “(j) *In applying subsection (a) to a component or part,*
2 *the court may consider the necessity for its intended and*
3 *actual incorporation in a technology, product, service or de-*
4 *vice, which (i) does not itself violate the provisions of this*
5 *chapter and (ii) has the sole purpose to prevent the access*
6 *of minors to material on the Internet.*

7 **“§ 1202. Integrity of copyright management informa-**
8 **tion**

9 “(a) *FALSE COPYRIGHT MANAGEMENT INFORMA-*
10 *TION.—No person shall knowingly and with the intent to*
11 *induce, enable, facilitate or conceal infringement—*

12 “(1) *provide copyright management information*
13 *that is false, or*

14 “(2) *distribute or import for distribution copy-*
15 *right management information that is false.*

16 “(b) *REMOVAL OR ALTERATION OF COPYRIGHT MAN-*
17 *AGEMENT INFORMATION.—No person shall, without the au-*
18 *thority of the copyright owner or the law—*

19 “(1) *intentionally remove or alter any copyright*
20 *management information,*

21 “(2) *distribute or import for distribution copy-*
22 *right management information knowing that the*
23 *copyright management information has been removed*
24 *or altered without authority of the copyright owner or*
25 *the law, or*

1 “(3) distribute, import for distribution, or pub-
2 licly perform works, copies of works, or phonorecords,
3 knowing that copyright management information has
4 been removed or altered without authority of the copy-
5 right owner or the law,
6 knowing, or, with respect to civil remedies under section
7 1203, having reasonable grounds to know, that it will in-
8 duce, enable, facilitate or conceal an infringement of any
9 right under this title.

10 “(c) DEFINITION.—As used in this chapter, ‘copyright
11 management information’ means the following information
12 conveyed in connection with copies or phonorecords of a
13 work or performances or displays of a work, including in
14 digital form—

15 “(1) the title and other information identifying
16 the work, including the information set forth on a no-
17 tice of copyright;

18 “(2) the name of, and other identifying informa-
19 tion about, the author of a work;

20 “(3) the name of, and other identifying informa-
21 tion about, the copyright owner of the work, including
22 the information set forth in a notice of copyright;

23 “(4) with the exception of public performances of
24 works by radio and television broadcast stations the
25 name of, and other identifying information about, a

1 performer whose performance is fixed in a work other
2 than an audiovisual work;

3 “(5) with the exception of public performances of
4 works by radio and television broadcast stations, in
5 the case of an audiovisual work, the name of, and
6 other identifying information about, a writer, per-
7 former, or director who is credited in the audiovisual
8 work;

9 “(6) terms and conditions for use of the work;

10 “(7) identifying numbers or symbols referring to
11 such information or links to such information; or

12 “(8) such other information as the Register of
13 Copyrights may prescribe by regulation, except that
14 the Register of Copyrights may not require the provi-
15 sion of any information concerning the user of a
16 copyrighted work.

17 “(d) *LAW ENFORCEMENT AND INTELLIGENCE ACTIVI-*
18 *TIES.*—*This section does not prohibit any lawfully author-*
19 *ized investigative, protective, or intelligence activity of an*
20 *officer, agent, or employee of the United States, a State,*
21 *or a political subdivision of a State, or a person acting*
22 *pursuant to a contract with such entities.*

23 “(e) *LIMITATIONS ON LIABILITY.*—

24 “(1) *ANALOG TRANSMISSIONS.*—*In the case of an*
25 *analog transmission, a person who is making trans-*

1 *missions in its capacity as a radio or television*
2 *broadcast station, or as a cable system, or someone*
3 *who provides programming to such station or system,*
4 *shall not be liable for a violation of subsection (b)*
5 *if—*

6 *“(A) avoiding the activity that constitutes*
7 *such violation is not technically feasible or would*
8 *create an undue financial hardship on such per-*
9 *son; and*

10 *“(B) such person did not intend, by engag-*
11 *ing in such activity, to induce, enable, facilitate*
12 *or conceal infringement.*

13 *“(2) DIGITAL TRANSMISSIONS.—*

14 *“(A) If a digital transmission standard for*
15 *the placement of copyright management informa-*
16 *tion for a category of works is set in a vol-*
17 *untary, consensus standard-setting process in-*
18 *volving a representative cross-section of radio or*
19 *television broadcast stations or cable systems and*
20 *copyright owners of a category of works that are*
21 *intended for public performance by such stations*
22 *or systems, a person identified in subsection*
23 *(e)(1) shall not be liable for a violation of sub-*
24 *section (b) with respect to the particular copy-*

1 *right management information addressed by*
2 *such standard if—*

3 “(i) *the placement of such information*
4 *by someone other than such person is not in*
5 *accordance with such standard; and*

6 “(ii) *the activity that constitutes such*
7 *violation is not intended to induce, enable,*
8 *facilitate or conceal infringement.*

9 “(B) *Until a digital transmission standard*
10 *has been set pursuant to subparagraph (A) with*
11 *respect to the placement of copyright manage-*
12 *ment information for a category or works, a per-*
13 *son identified in subsection (e)(1) shall not be*
14 *liable for a violation of subsection (b) with re-*
15 *spect to such copyright management informa-*
16 *tion, where the activity that constitutes such vio-*
17 *lation is not intended to induce, enable, facilitate*
18 *or conceal infringement, if—*

19 “(i) *the transmission of such informa-*
20 *tion by such person would result in a per-*
21 *ceptible visual or aural degradation of the*
22 *digital signal; or*

23 “(ii) *the transmission of such informa-*
24 *tion by such person would conflict with—*

1 “(I) an applicable government
2 regulation relating to transmission of
3 information in a digital signal;

4 “(II) an applicable industry-wide
5 standard relating to the transmission
6 of information in a digital signal that
7 was adopted by a voluntary consensus
8 standards body prior to the effective
9 date of this section; or

10 “(III) an applicable industry-
11 wide standard relating to the trans-
12 mission of information in a digital
13 signal that was adopted in a vol-
14 untary, consensus standards-setting
15 process open to participation by a rep-
16 resentative cross-section of radio or tel-
17 evision broadcast stations or cable sys-
18 tems and copyright owners of a cat-
19 egory of works that are intended for
20 public performance by such stations or
21 systems.

22 **“§ 1203. Civil remedies**

23 “(a) CIVIL ACTIONS.—Any person injured by a viola-
24 tion of section 1201 or 1202 may bring a civil action in

1 *an appropriate United States district court for such viola-*
2 *tion.*

3 “(b) *POWERS OF THE COURT.—In an action brought*
4 *under subsection (a), the court—*

5 “(1) *may grant temporary and permanent in-*
6 *junctions on such terms as it deems reasonable to pre-*
7 *vent or restrain a violation;*

8 “(2) *at any time while an action is pending,*
9 *may order the impounding, on such terms as it deems*
10 *reasonable, of any device or product that is in the*
11 *custody or control of the alleged violator and that the*
12 *court has reasonable cause to believe was involved in*
13 *a violation;*

14 “(3) *may award damages under subsection (c);*

15 “(4) *in its discretion may allow the recovery of*
16 *costs by or against any party other than the United*
17 *States or an officer thereof;*

18 “(5) *in its discretion may award reasonable at-*
19 *torney’s fees to the prevailing party; and*

20 “(6) *may, as part of a final judgment or decree*
21 *finding a violation, order the remedial modification*
22 *or the destruction of any device or product involved*
23 *in the violation that is in the custody or control of*
24 *the violator or has been impounded under paragraph*
25 *(2).*

1 “(c) *AWARD OF DAMAGES.*—

2 “(1) *IN GENERAL.*—*Except as otherwise provided*
3 *in this chapter, a person committing a violation of*
4 *section 1201 or 1202 is liable for either—*

5 “(A) *the actual damages and any addi-*
6 *tional profits of the violator, as provided in*
7 *paragraph (2), or*

8 “(B) *statutory damages, as provided in*
9 *paragraph (3).*

10 “(2) *ACTUAL DAMAGES.*—*The court shall award*
11 *to the complaining party the actual damages suffered*
12 *by the party as a result of the violation, and any*
13 *profits of the violator that are attributable to the vio-*
14 *lation and are not taken into account in computing*
15 *the actual damages, if the complaining party elects*
16 *such damages at any time before final judgment is*
17 *entered.*

18 “(3) *STATUTORY DAMAGES.*—

19 “(A) *At any time before final judgment is*
20 *entered, a complaining party may elect to re-*
21 *cover an award of statutory damages for each*
22 *violation of section 1201 in the sum of not less*
23 *than \$200 or more than \$2,500 per act of cir-*
24 *cumvention, device, product, component, offer, or*

1 *performance of service, as the court considers*
2 *just.*

3 “(B) *At any time before final judgment is*
4 *entered, a complaining party may elect to re-*
5 *cover an award of statutory damages for each*
6 *violation of section 1202 in the sum of not less*
7 *than \$2,500 or more than \$25,000.*

8 “(4) *REPEATED VIOLATIONS.—In any case in*
9 *which the injured party sustains the burden of prov-*
10 *ing, and the court finds, that a person has violated*
11 *section 1201 or 1202 within three years after a final*
12 *judgment was entered against the person for another*
13 *such violation, the court may increase the award of*
14 *damages up to triple the amount that would otherwise*
15 *be awarded, as the court considers just.*

16 “(5) *INNOCENT VIOLATIONS.—*

17 “(A) *IN GENERAL.—The court in its discre-*
18 *tion may reduce or remit the total award of*
19 *damages in any case in which the violator sus-*
20 *tains the burden of proving, and the court finds,*
21 *that the violator was not aware and had no rea-*
22 *son to believe that its acts constituted a viola-*
23 *tion.*

24 “(B) *NONPROFIT LIBRARY, ARCHIVES, OR*
25 *EDUCATIONAL INSTITUTIONS.—In the case of a*

1 *nonprofit library, archives, or educational insti-*
2 *tution, the court shall remit damages in any case*
3 *in which the library, archives, or educational in-*
4 *stitution sustains the burden of proving, and the*
5 *court finds, that the library, archives, or edu-*
6 *cational institution was not aware and had no*
7 *reason to believe that its acts constituted a viola-*
8 *tion.*

9 **“§ 1204. Criminal offenses and penalties**

10 “(a) *IN GENERAL.*—Any person who violates section
11 *1201 or 1202 willfully and for purposes of commercial ad-*
12 *vantage or private financial gain—*

13 “(1) *shall be fined not more than \$500,000 or*
14 *imprisoned for not more than 5 years, or both for the*
15 *first offense; and*

16 “(2) *shall be fined not more than \$1,000,000 or*
17 *imprisoned for not more than 10 years, or both for*
18 *any subsequent offense.*

19 “(b) *LIMITATION FOR NONPROFIT LIBRARY, AR-*
20 *CHIVES, OR EDUCATIONAL INSTITUTION.*—Subsection (a)
21 *shall not apply to a nonprofit library, archives, or edu-*
22 *cational institution.*

23 “(c) *STATUTE OF LIMITATIONS.*—Notwithstanding sec-
24 *tion 507(a) of this title, no criminal proceeding shall be*

1 brought under this section unless such proceeding is com-
 2 menced within five years after the cause of action arose.

3 **“§ 1205. Savings Clause**

4 “Nothing in this chapter abrogates, diminishes or
 5 weakens the provisions of, nor provides any defense or ele-
 6 ment of mitigation in a criminal prosecution or civil action
 7 under, any Federal or State law that prevents the violation
 8 of the privacy of an individual in connection with the indi-
 9 vidual’s use of the Internet.”.

10 **SEC. 104. CONFORMING AMENDMENT.**

11 The table of chapters for title 17, United States Code,
 12 is amended by adding at the end the following:

“12. Copyright Protection and Management Systems 1201”.

13 **SEC. 105. EFFECTIVE DATE.**

14 (a) *IN GENERAL.*—Subject to subsection (b), the
 15 amendments made by this title shall take effect on the date
 16 of the enactment of this Act.

17 (b) *AMENDMENTS RELATING TO CERTAIN INTER-*
 18 *NATIONAL AGREEMENTS.*—(1) The following shall take ef-
 19 fect upon entry into force of the WIPO Copyright Treaty
 20 with respect to the United States—

21 (A) paragraph (5) of the definition of “inter-
 22 national agreement” contained in section 101 of title
 23 17, United States Code, as amended by section
 24 102(a)(8) of this title;

1 (B) the amendment made by section 102(a)(10)
2 of this title;

3 (C) subparagraph (C) of section 104A(h)(1) of
4 title 17, United States Code, as amended by section
5 102(c)(1) of this title; and

6 (D) subparagraph (C) of section 104A(h)(3) of
7 title 17, United States Code, as amended by section
8 102(c)(2) of this title.

9 (2) The following shall take effect upon the entry into
10 force of the WIPO Performances and Phonograms Treaty
11 with respect to the United States—

12 (A) paragraph (6) of the definition of “inter-
13 national agreement” contained in section 101 of title
14 17, United States Code, as amended by section
15 102(a)(8) of this title;

16 (B) the amendment made by section 102(a)(11)
17 of this title;

18 (C) the amendment made by section 102(b)(7) of
19 this title;

20 (D) subparagraph (D) of section 104A(h)(1) of
21 title 17, United States Code, as amended by section
22 102(c)(2) of this title;

23 (E) the amendment made by section 102(c)(4) of
24 this title; and

1 (F) the amendment made by section 102(c)(5) of
2 this title.

3 **TITLE II—INTERNET COPYRIGHT**
4 **INFRINGEMENT LIABILITY**

5 **SEC. 201. SHORT TITLE.**

6 This title may be cited as the “Internet Copyright In-
7 fringement Liability Clarification Act of 1998”.

8 **SEC. 202. LIMITATIONS ON LIABILITY FOR INTERNET COPY-**
9 **RIGHT INFRINGEMENT.**

10 (a) *IN GENERAL.*—Chapter 5 of title 17, United States
11 Code, is amended by adding after section 511 the following
12 new section:

13 **“§512. Liability of service providers for online in-**
14 **fringement of copyright**

15 “(a) *DIGITAL NETWORK COMMUNICATIONS.*—A service
16 provider shall not be liable for monetary relief, or except
17 as provided in subsection (i) for injunctive or other equi-
18 table relief, for infringement for the provider’s transmitting,
19 routing, or providing connections for, material through a
20 system or network controlled or operated by or for the serv-
21 ice provider, or the intermediate and transient storage of
22 such material in the course of such transmitting, routing
23 or providing connections, if—

24 “(1) it was initiated by or at the direction of a
25 person other than the service provider;

1 “(2) it is carried out through an automatic tech-
2 nical process without selection of such material by the
3 service provider;

4 “(3) the service provider does not select the re-
5 cipients of such material except as an automatic re-
6 sponse to the request of another;

7 “(4) no such copy of such material made by the
8 service provider is maintained on the system or net-
9 work in a manner ordinarily accessible to anyone
10 other than anticipated recipients, and no such copy
11 is maintained on the system or network in a manner
12 ordinarily accessible to the anticipated recipients for
13 a longer period than is reasonably necessary for the
14 communication; and

15 “(5) the material is transmitted without modi-
16 fication to its content.

17 “(b) *SYSTEM CACHING*.—A service provider shall not
18 be liable for monetary relief, or except as provided in sub-
19 section (i) for injunctive or other equitable relief, for in-
20 fringement for the intermediate and temporary storage of
21 material on the system or network controlled or operated
22 by or for the service provider: *Provided, That—*

23 “(1) such material is made available online by
24 a person other than such service provider,

1 “(2) such material is transmitted from the per-
2 son described in paragraph (1) through such system
3 or network to someone other than that person at the
4 direction of such other person,

5 “(3) the storage is carried out through an auto-
6 matic technical process for the purpose of making
7 such material available to users of such system or net-
8 work who subsequently request access to that material
9 from the person described in paragraph (1):

10 *Provided further, That—*

11 “(4) such material is transmitted to such subse-
12 quent users without modification to its content from
13 the manner in which the material otherwise was
14 transmitted from the person described in paragraph
15 (1);

16 “(5) such service provider complies with rules
17 concerning the refreshing, reloading or other updating
18 of such material when specified by the person making
19 that material available online in accordance with an
20 accepted industry standard data communications
21 protocol for the system or network through which that
22 person makes the material available: *Provided fur-*
23 *ther, That the rules are not used by the person de-*
24 *scribed in paragraph (1) to prevent or unreasonably*
25 *impair such intermediate storage;*

1 “(6) such service provider does not interfere with
2 the ability of technology associated with such material
3 that returns to the person described in paragraph (1)
4 the information that would have been available to
5 such person if such material had been obtained by
6 such subsequent users directly from such person: Pro-
7 vided further, That such technology—

8 “(A) does not significantly interfere with
9 the performance of the provider’s system or net-
10 work or with the intermediate storage of the ma-
11 terial;

12 “(B) is consistent with accepted industry
13 standard communications protocols; and

14 “(C) does not extract information from the
15 provider’s system or network other than the in-
16 formation that would have been available to such
17 person if such material had been accessed by
18 such users directly from such person;

19 “(7) either—

20 “(A) the person described in paragraph (1)
21 does not currently condition access to such mate-
22 rial; or

23 “(B) if access to such material is so condi-
24 tioned by such person, by a current individual
25 pre-condition, such as a pre-condition based on

1 *payment of a fee, or provision of a password or*
2 *other information, the service provider permits*
3 *access to the stored material in significant part*
4 *only to users of its system or network that have*
5 *been so authorized and only in accordance with*
6 *those conditions; and*

7 “(8) *if the person described in paragraph (1)*
8 *makes that material available online without the au-*
9 *thorization of the copyright owner, then the service*
10 *provider responds expeditiously to remove, or disable*
11 *access to, the material that is claimed to be infringing*
12 *upon notification of claimed infringements described*
13 *in subsection (c)(3): Provided further, That the mate-*
14 *rial has previously been removed from the originating*
15 *site, and the party giving the notification includes in*
16 *the notification a statement confirming that such ma-*
17 *terial has been removed or access to it has been dis-*
18 *abled or ordered to be removed or have access dis-*
19 *abled.*

20 “(c) *INFORMATION STORED ON SERVICE PROVID-*
21 *ERS.—*

22 “(1) *IN GENERAL.—A service provider shall not*
23 *be liable for monetary relief, or except as provided in*
24 *subsection (i) for injunctive or other equitable relief,*
25 *for infringement for the storage at the direction of a*

1 *user of material that resides on a system or network*
2 *controlled or operated by or for the service provider,*
3 *if the service provider—*

4 *“(A)(i) does not have actual knowledge that*
5 *the material or activity is infringing,*

6 *“(ii) in the absence of such actual knowl-*
7 *edge, is not aware of facts or circumstances from*
8 *which infringing activity is apparent, or*

9 *“(iii) if upon obtaining such knowledge or*
10 *awareness, the service provider acts expeditiously*
11 *to remove or disable access to, the material;*

12 *“(B) does not receive a financial benefit di-*
13 *rectly attributable to the infringing activity,*
14 *where the service provider has the right and abil-*
15 *ity to control such activity; and*

16 *“(C) in the instance of a notification of*
17 *claimed infringement as described in paragraph*
18 *(3), responds expeditiously to remove, or disable*
19 *access to, the material that is claimed to be in-*
20 *fringing or to be the subject of infringing activ-*
21 *ity.*

22 *“(2) DESIGNATED AGENT.—The limitations on*
23 *liability established in this subsection apply only if*
24 *the service provider has designated an agent to receive*
25 *notifications of claimed infringement described in*

1 paragraph (3), by substantially making the name, ad-
2 dress, phone number, electronic mail address of such
3 agent, and other contact information deemed appro-
4 priate by the Register of Copyrights, available
5 through its service, including on its website, and by
6 providing such information to the Copyright Office.
7 The Register of Copyrights shall maintain a current
8 directory of agents available to the public for inspec-
9 tion, including through the Internet, in both electronic
10 and hard copy formats.

11 “(3) *ELEMENTS OF NOTIFICATION.*—

12 “(A) *To be effective under this subsection, a*
13 *notification of claimed infringement means any*
14 *written communication provided to the service*
15 *provider’s designated agent that includes sub-*
16 *stantially the following—*

17 “(i) *a physical or electronic signature*
18 *of a person authorized to act on behalf of*
19 *the owner of an exclusive right that is alleg-*
20 *edly infringed;*

21 “(ii) *identification of the copyrighted*
22 *work claimed to have been infringed, or, if*
23 *multiple such works at a single online site*
24 *are covered by a single notification, a rep-*
25 *resentative list of such works at that site;*

1 “(iii) identification of the material
2 that is claimed to be infringing or to be the
3 subject of infringing activity that is to be
4 removed or access to which is to be disabled,
5 and information reasonably sufficient to
6 permit the service provider to locate the ma-
7 terial;

8 “(iv) information reasonably sufficient
9 to permit the service provider to contact the
10 complaining party, such as an address, tele-
11 phone number, and, if available an elec-
12 tronic mail address at which the complain-
13 ing party may be contacted;

14 “(v) a statement that the complaining
15 party has a good faith belief that use of the
16 material in the manner complained of is
17 not authorized by the copyright owner, or
18 its agent, or the law; and

19 “(vi) a statement that the information
20 in the notification is accurate, and under
21 penalty of perjury, that the complaining
22 party has the authority to enforce the own-
23 er’s rights that are claimed to be infringed.

24 “(B) A notification from the copyright
25 owner or from a person authorized to act on be-

1 *half of the copyright owner that fails substan-*
2 *tially to conform to the provisions of paragraph*
3 *(3)(A) shall not be considered under paragraph*
4 *(1)(A) in determining whether a service provider*
5 *has actual knowledge or is aware of facts or cir-*
6 *cumstances from which infringing activity is ap-*
7 *parent: Provided, That the provider promptly at-*
8 *tempts to contact the complaining party or takes*
9 *other reasonable steps to assist in the receipt of*
10 *notice under paragraph (3)(A) when the notice is*
11 *provided to the service provider’s designated*
12 *agent and substantially satisfies the provisions of*
13 *paragraphs (3)(A) (ii), (iii), and (iv).*

14 “(d) *INFORMATION LOCATION TOOLS.*—*A service pro-*
15 *vider shall not be liable for monetary relief, or except as*
16 *provided in subsection (i) for injunctive or other equitable*
17 *relief, for infringement for the provider referring or linking*
18 *users to an online location containing infringing material*
19 *or activity by using information location tools, including*
20 *a directory, index, reference, pointer or hypertext link, if*
21 *the provider—*

22 “(1) *does not have actual knowledge that the ma-*
23 *terial or activity is infringing or, in the absence of*
24 *such actual knowledge, is not aware of facts or cir-*

1 *cumstances from which infringing activity is appar-*
2 *ent;*

3 *“(2) does not receive a financial benefit directly*
4 *attributable to the infringing activity, where the serv-*
5 *ice provider has the right and ability to control such*
6 *activity; and*

7 *“(3) responds expeditiously to remove or disable*
8 *the reference or link upon notification of claimed in-*
9 *fringement as described in subsection (c)(3): Provided,*
10 *That for the purposes of this paragraph, the element*
11 *in subsection (c)(3)(A)(iii) shall be identification of*
12 *the reference or link, to material or activity claimed*
13 *to be infringing, that is to be removed or access to*
14 *which is to be disabled, and information reasonably*
15 *sufficient to permit the service provider to locate such*
16 *reference or link.*

17 *“(e) MISREPRESENTATIONS.—Any person who know-*
18 *ingly materially misrepresents under this section—*

19 *(1) that material or activity is infringing, or*

20 *(2) that material or activity was removed or dis-*
21 *abled by mistake or misidentification,*

22 *shall be liable for any damages, including costs and attor-*
23 *neys’ fees, incurred by the alleged infringer, by any copy-*
24 *right owner or copyright owner’s authorized licensee, or by*
25 *the service provider, who is injured by such misrepresenta-*

1 *tion, as the result of the service provider relying upon such*
2 *misrepresentation in removing or disabling access to the*
3 *material or activity claimed to be infringing, or in replac-*
4 *ing the removed material or ceasing to disable access to it.*

5 “(f) *REPLACEMENT OF REMOVED OR DISABLED MATE-*
6 *RIAL AND LIMITATION ON OTHER LIABILITY.—*

7 “(1) *Subject to paragraph (2) of this subsection,*
8 *a service provider shall not be liable to any person for*
9 *any claim based on the service provider’s good faith*
10 *disabling of access to, or removal of, material or ac-*
11 *tivity claimed to be infringing or based on facts or*
12 *circumstances from which infringing activity is ap-*
13 *parent, regardless of whether the material or activity*
14 *is ultimately determined to be infringing.*

15 “(2) *Paragraph (1) of this subsection shall not*
16 *apply with respect to material residing at the direc-*
17 *tion of a subscriber of the service provider on a sys-*
18 *tem or network controlled or operated by or for the*
19 *service provider that is removed, or to which access is*
20 *disabled by the service provider pursuant to a notice*
21 *provided under subsection (c)(1)(C), unless the service*
22 *provider—*

23 “(A) *takes reasonable steps promptly to no-*
24 *tify the subscriber that it has removed or dis-*
25 *abled access to the material;*

1 “(B) upon receipt of a counter notice as de-
2 scribed in paragraph (3), promptly provides the
3 person who provided the notice under subsection
4 (c)(1)(C) with a copy of the counter notice, and
5 informs such person that it will replace the re-
6 moved material or cease disabling access to it in
7 ten business days; and

8 “(C) replaces the removed material and
9 ceases disabling access to it not less than 10, nor
10 more than 14, business days following receipt of
11 the counter notice, unless its designated agent
12 first receives notice from the person who submit-
13 ted the notification under subsection (c)(1)(C)
14 that such person has filed an action seeking a
15 court order to restrain the subscriber from engag-
16 ing in infringing activity relating to the mate-
17 rial on the service provider’s system or network.

18 “(3) To be effective under this subsection, a
19 counter notification means any written communica-
20 tion provided to the service provider’s designated
21 agent that includes substantially the following:

22 “(A) A physical or electronic signature of
23 the subscriber.

24 “(B) Identification of the material that has
25 been removed or to which access has been dis-

1 *abled and the location at which such material*
2 *appeared before it was removed or access was*
3 *disabled.*

4 *“(C) A statement under penalty of perjury*
5 *that the subscriber has a good faith belief that*
6 *the material was removed or disabled as a result*
7 *of mistake or misidentification of the material to*
8 *be removed or disabled.*

9 *“(D) The subscriber’s name, address and*
10 *telephone number, and a statement that the sub-*
11 *scriber consents to the jurisdiction of Federal*
12 *Court for the judicial district in which the ad-*
13 *dress is located, or if the subscriber’s address is*
14 *outside of the United States, for any judicial dis-*
15 *trict in which the service provider may be found,*
16 *and that the subscriber will accept service of*
17 *process from the person who provided notice*
18 *under subsection (c)(1)(C) or agent of such per-*
19 *son.*

20 *“(4) A service provider’s compliance with para-*
21 *graph (2) shall not subject the service provider to li-*
22 *ability for copyright infringement with respect to the*
23 *material identified in the notice provided under sub-*
24 *section (c)(1)(C).*

1 “(g) *IDENTIFICATION OF DIRECT INFRINGER.*—The
2 *copyright owner or a person authorized to act on the own-*
3 *er’s behalf may request an order for release of identification*
4 *of an alleged infringer by filing—*

5 (1) *a copy of a notification described in sub-*
6 *section (c)(3)(A), including a proposed order, and*

7 (2) *a sworn declaration that the purpose of the*
8 *order is to obtain the identity of an alleged infringer*
9 *and that such information will only be used for the*
10 *purpose of this title, with the clerk of any United*
11 *States district court.*

12 *The order shall authorize and order the service provider re-*
13 *ceiving the notification to disclose expeditiously to the copy-*
14 *right owner or person authorized by the copyright owner*
15 *information sufficient to identify the alleged direct in-*
16 *fringer of the material described in the notification to the*
17 *extent such information is available to the service provider.*

18 *The order shall be expeditiously issued if the accompanying*
19 *notification satisfies the provisions of subsection (c)(3)(A)*
20 *and the accompanying declaration is properly executed.*

21 *Upon receipt of the order, either accompanying or subse-*
22 *quent to the receipt of a notification described in subsection*
23 *(c)(3)(A), a service provider shall expeditiously give to the*
24 *copyright owner or person authorized by the copyright*
25 *owner the information required by the order, notwithstand-*

1 *ing any other provision of law and regardless of whether*
2 *the service provider responds to the notification.*

3 *“(h) CONDITIONS FOR ELIGIBILITY.—*

4 *“(1) ACCOMMODATION OF TECHNOLOGY.—The*
5 *limitations on liability established by this section*
6 *shall apply only if the service provider—*

7 *“(A) has adopted and reasonably imple-*
8 *mented, and informs subscribers of the service of,*
9 *a policy for the termination of subscribers of the*
10 *service who are repeat infringers; and*

11 *“(B) accommodates and does not interfere*
12 *with standard technical measures as defined in*
13 *this subsection.*

14 *“(2) DEFINITION.—As used in this section,*
15 *‘standard technical measures’ are technical measures,*
16 *used by copyright owners to identify or protect copy-*
17 *righted works, that—*

18 *“(A) have been developed pursuant to a*
19 *broad consensus of copyright owners and service*
20 *providers in an open, fair, voluntary, multi-in-*
21 *dustry standards process;*

22 *“(B) are available to any person on reason-*
23 *able and nondiscriminatory terms; and*

1 “(C) do not impose substantial costs on
2 service providers or substantial burdens on their
3 systems or networks.

4 “(i) INJUNCTIONS.—The following rules shall apply in
5 the case of any application for an injunction under section
6 502 against a service provider that is not subject to mone-
7 tary remedies by operation of this section.

8 “(1) SCOPE OF RELIEF.—

9 “(A) With respect to conduct other than
10 that which qualifies for the limitation on rem-
11 edies as set forth in subsection (a), the court may
12 only grant injunctive relief with respect to a
13 service provider in one or more of the following
14 forms—

15 “(i) an order restraining it from pro-
16 viding access to infringing material or ac-
17 tivity residing at a particular online site on
18 the provider’s system or network;

19 “(ii) an order restraining it from pro-
20 viding access to an identified subscriber of
21 the service provider’s system or network who
22 is engaging in infringing activity by termi-
23 nating the specified accounts of such sub-
24 scriber; or

1 “(iii) such other injunctive remedies as
2 the court may consider necessary to prevent
3 or restrain infringement of specified copy-
4 righted material at a particular online lo-
5 cation: Provided, That such remedies are
6 the least burdensome to the service provider
7 that are comparably effective for that pur-
8 pose.

9 “(B) If the service provider qualifies for the
10 limitation on remedies described in subsection
11 (a), the court may only grant injunctive relief in
12 one or both of the following forms—

13 “(i) an order restraining it from pro-
14 viding access to an identified subscriber of
15 the service provider’s system or network who
16 is using the provider’s service to engage in
17 infringing activity by terminating the spec-
18 ified accounts of such subscriber; or

19 “(ii) an order restraining it from pro-
20 viding access, by taking specified reasonable
21 steps to block access, to a specific, identified,
22 foreign online location.

23 “(2) CONSIDERATIONS.—The court, in consider-
24 ing the relevant criteria for injunctive relief under
25 applicable law, shall consider—

1 “(A) whether such an injunction, either
2 alone or in combination with other such injunc-
3 tions issued against the same service provider
4 under this subsection, would significantly burden
5 either the provider or the operation of the pro-
6 vider’s system or network;

7 “(B) the magnitude of the harm likely to be
8 suffered by the copyright owner in the digital
9 network environment if steps are not taken to
10 prevent or restrain the infringement;

11 “(C) whether implementation of such an in-
12 junction would be technically feasible and effec-
13 tive, and would not interfere with access to non-
14 infringing material at other online locations;
15 and

16 “(D) whether other less burdensome and
17 comparably effective means of preventing or re-
18 straining access to the infringing material are
19 available.

20 “(3) NOTICE AND EX PARTE ORDERS.—Injunc-
21 tive relief under this subsection shall not be available
22 without notice to the service provider and an oppor-
23 tunity for such provider to appear, except for orders
24 ensuring the preservation of evidence or other orders

1 *having no material adverse effect on the operation of*
2 *the service provider’s communications network.*

3 “(j) *DEFINITIONS.*—

4 “(1)(A) *As used in subsection (a), the term ‘serv-*
5 *ice provider’ means an entity offering the trans-*
6 *mission, routing or providing of connections for digi-*
7 *tal online communications, between or among points*
8 *specified by a user, of material of the user’s choosing,*
9 *without modification to the content of the material as*
10 *sent or received.*

11 “(B) *As used in any other subsection of this sec-*
12 *tion, the term ‘service provider’ means a provider of*
13 *online services or network access, or the operator of*
14 *facilities therefor, and includes an entity described in*
15 *the preceding paragraph of this subsection.*

16 “(2) *As used in this section, the term ‘monetary*
17 *relief’ means damages, costs, attorneys’ fees, and any*
18 *other form of monetary payment.*

19 “(k) *OTHER DEFENSES NOT AFFECTED.*—*The failure*
20 *of a service provider’s conduct to qualify for limitation of*
21 *liability under this section shall not bear adversely upon*
22 *the consideration of a defense by the service provider that*
23 *the service provider’s conduct is not infringing under this*
24 *title or any other defense.*

1 “(l) *PROTECTION OF PRIVACY.*—Nothing in this sec-
2 tion shall be construed to condition the applicability of sub-
3 sections (a) through (d) on—

4 “(1) a service provider monitoring its service or
5 affirmatively seeking facts indicating infringing ac-
6 tivity except to the extent consistent with a standard
7 technical measure complying with the provisions of
8 subsection (h); or

9 “(2) a service provider accessing, removing, or
10 disabling access to material where such conduct is
11 prohibited by law.

12 “(m) *RULE OF CONSTRUCTION.*—Subsections (a), (b),
13 (c), and (d) are intended to describe separate and distinct
14 functions for purposes of analysis under this section. Wheth-
15 er a service provider qualifies for the limitation on liability
16 in any one such subsection shall be based solely on the cri-
17 teria in each such subsection and shall not affect a deter-
18 mination of whether such service provider qualifies for the
19 limitations on liability under any other such subsection.”.

20 **SEC. 203. CONFORMING AMENDMENT.**

21 The table of sections for chapter 5 of title 17, United
22 States Code, is amended by adding at the end the following:

“512. Liability of service providers for online infringement of copyright.”.

1 **SEC. 204. LIABILITY OF EDUCATIONAL INSTITUTIONS FOR**
2 **ONLINE INFRINGEMENT OF COPYRIGHT.**

3 (a) *Not later than six months after the date of enact-*
4 *ment of this Act, the Register of Copyrights, after consulta-*
5 *tion with representatives of copyright owners and nonprofit*
6 *educational institutions, shall submit to the Congress rec-*
7 *ommendations regarding the liability of nonprofit edu-*
8 *cational institutions for copyright infringement committed*
9 *with the use of computer systems for which such an institu-*
10 *tion is a service provider, as that term is defined in section*
11 *512 of title 17, United States Code, (as amended by this*
12 *Act), including recommendations for legislation the Register*
13 *of Copyrights considers appropriate regarding such liabil-*
14 *ity, if any.*

15 (b) *In formulating recommendations, the Register of*
16 *Copyrights shall consider, where relevant—*

17 (1) *current law regarding the direct, vicarious,*
18 *and contributory liability of nonprofit educational*
19 *institutions for infringement by faculty, administra-*
20 *tive employees, students, graduate students, and stu-*
21 *dents who are employees of a nonprofit educational*
22 *institution;*

23 (2) *other users of their computer systems for*
24 *whom nonprofit educational institutions may be re-*
25 *sponsible;*

1 (3) *the unique nature of the relationship between*
2 *nonprofit educational institutions and faculty;*

3 (4) *what policies nonprofit educational institu-*
4 *tions should adopt regarding copyright infringement*
5 *by users of their computer systems;*

6 (5) *what technological measures are available to*
7 *monitor infringing uses;*

8 (6) *what monitoring of their computer systems*
9 *by nonprofit educational institutions is appropriate;*

10 (7) *what due process nonprofit educational insti-*
11 *tutions should afford in disabling access by users of*
12 *their computer systems who are alleged to have com-*
13 *mitted copyright infringement;*

14 (8) *what distinctions, if any, should be drawn*
15 *between computer systems which may be accessed*
16 *from outside the nonprofit educational systems, those*
17 *which may not, and combinations thereof;*

18 (9) *the tradition of academic freedom; and*

19 (10) *such other issues relating to the liability of*
20 *nonprofit educational institutions for copyright in-*
21 *fringement committed with the use of computer sys-*
22 *tems for which such an institution is a service pro-*
23 *vider that the Register considers appropriate.*

1 **SEC. 205. EFFECTIVE DATE.**

2 *This title and the amendments made by this title shall*
 3 *take effect on the date of the enactment of this Act.*

4 **TITLE III—COMPUTER**
 5 **MAINTENANCE OR REPAIR**

6 **SEC. 301. LIMITATION ON EXCLUSIVE RIGHTS; COMPUTER**
 7 **PROGRAMS.**

8 *Section 117 of title 17, United States Code, is amend-*
 9 *ed—*

10 *(1) by striking “Notwithstanding” and inserting*
 11 *the following:*

12 *“(a) MAKING OF ADDITIONAL COPY OR ADAPTATION*
 13 *BY OWNER OF COPY.—Notwithstanding”;*

14 *(2) by striking “Any exact” and inserting the*
 15 *following:*

16 *“(b) LEASE, SALE, OR OTHER TRANSFER OF ADDI-*
 17 *TIONAL COPY OR ADAPTATION.—Any exact”;* and

18 *(3) by adding at the end the following new sub-*
 19 *sections:*

20 *“(c) MACHINE MAINTENANCE OR REPAIR.—Notwith-*
 21 *standing the provisions of section 106, it is not an infringe-*
 22 *ment for an owner or lessee of a machine to make or author-*
 23 *ize the making of a copy of a computer program if such*
 24 *copy is made solely by virtue of the activation of a machine*
 25 *that lawfully contains an authorized copy of the computer*

1 *program, for purposes only of maintenance or repair of that*
2 *machine, if—*

3 “(1) *such new copy is used in no other manner*
4 *and is destroyed immediately after the maintenance*
5 *or repair is completed; and*

6 “(2) *with respect to any computer program or*
7 *part thereof that is not necessary for that machine to*
8 *be activated, such program or part thereof is not*
9 *accessed or used other than to make such new copy by*
10 *virtue of the activation of the machine.*

11 “(d) *DEFINITIONS.—For purposes of this section—*

12 “(1) *the ‘maintenance’ of a machine is the serv-*
13 *icing of the machine in order to make it work in ac-*
14 *cordance with its original specifications and any*
15 *changes to those specifications authorized for that ma-*
16 *chine; and*

17 “(2) *the ‘repair’ of a machine is the restoring of*
18 *the machine to the state of working in accordance*
19 *with its original specifications and any changes to*
20 *those specifications authorized for that machine.”.*

1 **TITLE IV—EPHEMERAL RECORD-**
2 **INGS; DISTANCE EDUCATION;**
3 **EXEMPTION FOR LIBRARIES**
4 **AND ARCHIVES**

5 **SEC. 401. EPHEMERAL RECORDINGS.**

6 *Section 112 of title 17, United States Code, is amended*
7 *by—*

8 *(1) redesignating section 112(a) as 112(a)(1),*
9 *and renumbering sections 112(a) (1), (2), and (3) as*
10 *sections 112(a)(1) (A), (B), and (C), respectively;*

11 *(2) in section 112(a)(1), after the reference to*
12 *section 114(a), add the words “or for a transmitting*
13 *organization that is a broadcast radio or television*
14 *station licensed as such by the Federal Communica-*
15 *tions Commission that broadcasts a performance of a*
16 *sound recording in a digital format on a nonsubscrip-*
17 *tion basis,”;*

18 *(3) adding new section 112(a)(2) as follows:*

19 *“(2) Where a transmitting organization entitled to*
20 *make a copy or phonorecord under section 112(a)(1) in con-*
21 *nection with the transmission to the public of a performance*
22 *or display of a work pursuant to that section is prevented*
23 *from making such copy or phonorecord by reason of the ap-*
24 *plication by the copyright owner of technical measures that*
25 *prevent the reproduction of the work, such copyright owner*

1 shall make available to the transmitting organization the
2 necessary means for permitting the making of such copy
3 or phonorecord within the meaning of that section: Pro-
4 vided, That it is technologically feasible and economically
5 reasonable for the copyright owner to do so, and: Provided
6 further, That, if such copyright owner fails to do so in a
7 timely manner in light of the transmitting organization's
8 reasonable business requirements, the transmitting organi-
9 zation shall not be liable for a violation of section
10 1201(a)(1) of this title for engaging in such activities as
11 are necessary to make such copies or phonorecords as per-
12 mitted under section 112(a)(1).”

13 **SEC. 402. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE**
14 **EDUCATION.**

15 (a) Not later than six months after the date of enact-
16 ment of this Act, the Register of Copyrights, after consulta-
17 tion with representatives of copyright owners, nonprofit
18 educational institutions and nonprofit libraries and ar-
19 chives, shall submit to the Congress recommendations on
20 how to promote distance education through digital tech-
21 nologies, including interactive digital networks, while
22 maintaining an appropriate balance between the rights of
23 copyright owners and the needs of users. Such recommenda-
24 tions shall include any legislation the Register of Copy-

1 *rights considers appropriate to achieve the foregoing objec-*
2 *tive.*

3 *(b) In formulating recommendations, the Register of*
4 *Copyrights shall consider—*

5 *(1) the need for an exemption from exclusive*
6 *rights for distance education through digital net-*
7 *works;*

8 *(2) the categories of works to be included under*
9 *any distance education exemption;*

10 *(3) the extent of appropriate quantitative limita-*
11 *tions on the portions of works that may be used under*
12 *any distance education exemption;*

13 *(4) the parties who should be entitled to the bene-*
14 *fits of any distance education exemption;*

15 *(5) the parties who should be designated as eligi-*
16 *ble recipients of distance education materials under*
17 *any distance education exemption;*

18 *(6) whether and what types of technological*
19 *measures can and/or should be employed to safeguard*
20 *against unauthorized access to, and use or retention*
21 *of, copyrighted materials as a condition to eligibility*
22 *for any distance education exemption, including, in*
23 *light of developing technological capabilities, the ex-*
24 *emption set out in section 110(2);*

1 (7) *the extent to which the availability of licenses*
2 *for the use of copyrighted works in distance education*
3 *through interactive digital networks should be consid-*
4 *ered in assessing eligibility for any distance edu-*
5 *cation exemption; and*

6 (8) *such other issues relating to distance edu-*
7 *cation through interactive digital networks that the*
8 *Register considers appropriate.*

9 **SEC. 403. EXEMPTION FOR LIBRARIES AND ARCHIVES.**

10 *Section 108 of title 17, United States Code, is amend-*
11 *ed—*

12 (1) *in subsection (a) by—*

13 (A) *striking “Notwithstanding” and insert-*
14 *ing “Except as otherwise provided and notwith-*
15 *standing”;*

16 (B) *inserting after “no more than one copy*
17 *of phonorecord of a work” the following: “except*
18 *as provided in subsections (b) and (c),”;* and

19 (C) *by inserting after “copyright” in para-*
20 *graph (3) the following: “if such notice appears*
21 *on the copy or phonorecord that is reproduced*
22 *under the provisions of this section, or a legend*
23 *stating that the work may be protected by copy-*
24 *right if no such notice can be found on the copy*

1 *or phonorecord that is reproduced under the pro-*
2 *visions of this section”;*

3 *(2) in subsection (b) by—*

4 *(A) striking “a copy or phonorecord” and*
5 *inserting in lieu thereof “three copies or*
6 *phonorecords”;*

7 *(B) striking “in facsimile form”; and*

8 *(C) striking “if the copy or phonorecord re-*
9 *produced is currently in the collections of the li-*
10 *brary or archives.” and inserting in lieu thereof*
11 *“if—*

12 *“(1) the copy or phonorecord reproduced is cur-*
13 *rently in the collections of the library or archives; and*

14 *“(2) any such copy or phonorecord that is repro-*
15 *duced in digital format is not otherwise distributed in*
16 *that format and is not made available to the public*
17 *outside the premises of the library or archives in that*
18 *format.”; and*

19 *(3) in subsection (c) by—*

20 *(A) striking “a copy or phonorecord” and*
21 *inserting in lieu thereof “three copies or*
22 *phonorecords”;*

23 *(B) striking “in facsimile form”;*

1 (C) inserting “or if the existing format in
2 which the work is stored has become obsolete,”
3 after “stolen,”; and

4 (D) striking “if the library or archives has,
5 after a reasonable effort, determined that an un-
6 used replacement cannot be obtained at a fair
7 price.” and inserting in lieu thereof “if—

8 “(1) the library or archives has, after a reason-
9 able effort, determined that an unused replacement
10 cannot be obtained at a fair price; and

11 “(2) any such copy or phonorecord that is repro-
12 duced in digital format is not made available to the
13 public in that format except for use on the premises
14 of the library or archives in lawful possession of such
15 copy.”;

16 (E) adding at the end the following: “For
17 purposes of this subsection, a format shall be
18 considered obsolete if the machine or device nec-
19 essary to render perceptible a work stored in that
20 format is no longer manufactured or is no longer

1 *reasonably available in the commercial market-*
2 *place.”.*

Attest:

Secretary.

105TH CONGRESS
2^D SESSION

H. R. 2281

AMENDMENT

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