

Calendar No. 535

105<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

**H. R. 2281**

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**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.

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AUGUST 31, 1998

Received; read twice and placed on the calendar

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IN THE SENATE OF THE UNITED STATES

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**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.

1        *Be it enacted by the Senate and House of Representa-*  
2        *tives of the United States of America in Congress assembled,*

**1 SECTION 1. SHORT TITLE.**

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

**4 SEC. 2. TABLE OF CONTENTS.**

Sec. 1. Short title.  
Sec. 2. Table of contents.

TITLE I—WIPO COPYRIGHT TREATIES IMPLEMENTATION

Sec. 101. Short title.  
Sec. 102. Technical amendments.  
Sec. 103. Copyright protection systems and copyright management information.  
Sec. 104. Development and implementation of technological protection measures.  
Sec. 105. Evaluation of impact of copyright law and amendments on electronic commerce and technological development.  
Sec. 106. Effective date.

TITLE II—ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

Sec. 201. Short title.  
Sec. 202. Limitations on liability for copyright infringement.  
Sec. 203. Effective date.

TITLE III—COMPUTER MAINTENANCE OR REPAIR COPYRIGHT EXEMPTION

Sec. 301. Short title.  
Sec. 302. Limitations on exclusive rights; computer programs.

TITLE IV—MISCELLANEOUS PROVISIONS

Subtitle A—Establishment of the Under Secretary of Commerce for Intellectual Property Policy

Sec. 401. Under Secretary of Commerce for Intellectual Property Policy.  
Sec. 402. Relationship with existing authorities.

Subtitle B—Related Provisions

Sec. 411. Ephemeral recordings.  
Sec. 412. Limitations on exclusive rights; distance education.  
Sec. 413. Exemption for libraries and archives.  
Sec. 414. Fair use.  
Sec. 415. Scope of exclusive rights in sound recordings; ephemeral recordings.  
Sec. 416. Assumption of contractual obligations related to transfers of rights in motion pictures.  
Sec. 417. First sale clarification.

TITLE V—COLLECTIONS OF INFORMATION ANTIPIRACY ACT

Sec. 501. Short title.

- Sec. 502. Misappropriation of collections of information.  
 Sec. 503. Conforming amendment.  
 Sec. 504. Conforming amendments to title 28, United States Code.  
 Sec. 505. Effective date.

#### TITLE VI—PROTECTION OF CERTAIN ORIGINAL DESIGNS

- Sec. 601. Short title.  
 Sec. 602. Protection of certain original designs.  
 Sec. 603. Conforming amendments.  
 Sec. 604. Effective date.

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

### 3   **SEC. 101. SHORT TITLE.**

4           This title may be cited as the “WIPO Copyright  
 5 Treaties Implementation Act”.

### 6   **SEC. 102. TECHNICAL AMENDMENTS.**

7           (a) DEFINITIONS.—Section 101 of title 17, United  
 8 States Code, is amended—

9                   (1) by striking the definition of “Berne Conven-  
 10 tion work”;

11                   (2) in the definition of “The ‘country of origin’  
 12 of a Berne Convention work”—

13                           (A) by striking “The ‘country of origin’ of  
 14 a Berne Convention work, for purposes of sec-  
 15 tion 411, is the United States if” and inserting  
 16 “For purposes of section 411, a work is a  
 17 ‘United States work’ only if”;

18                           (B) in paragraph (1)—

19                                   (i) in subparagraph (B) by striking  
 20 “nation or nations adhering to the Berne

1 Convention” and inserting “treaty party or  
2 parties”;

3 (ii) in subparagraph (C) by striking  
4 “does not adhere to the Berne Convention”  
5 and inserting “is not a treaty party”; and

6 (iii) in subparagraph (D) by striking  
7 “does not adhere to the Berne Convention”  
8 and inserting “is not a treaty party”; and

9 (C) in the matter following paragraph (3)  
10 by striking “For the purposes of section 411,  
11 the ‘country of origin’ of any other Berne Con-  
12 vention work is not the United States.”;

13 (3) by inserting after the definition of “fixed”  
14 the following:

15 “The ‘Geneva Phonograms Convention’ is the  
16 Convention for the Protection of Producers of  
17 Phonograms Against Unauthorized Duplication of  
18 Their Phonograms, concluded at Geneva, Switzer-  
19 land, on October 29, 1971.”;

20 (4) by inserting after the definition of “includ-  
21 ing” the following:

22 “An ‘international agreement’ is—

23 “(1) the Universal Copyright Convention;

24 “(2) the Geneva Phonograms Convention;

25 “(3) the Berne Convention;

1 “(4) the WTO Agreement;

2 “(5) the WIPO Copyright Treaty;

3 “(6) the WIPO Performances and  
4 Phonograms Treaty; and

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

7 (5) by inserting after the definition of “trans-  
8 mit” the following:

9 “A ‘treaty party’ is a country or intergovern-  
10 mental organization other than the United States  
11 that is a party to an international agreement.”;

12 (6) by inserting after the definition of “widow”  
13 the following:

14 “The ‘WIPO Copyright Treaty’ is the WIPO  
15 Copyright Treaty concluded at Geneva, Switzerland,  
16 on December 20, 1996.”;

17 (7) by inserting after the definition of “The  
18 ‘WIPO Copyright Treaty’ ” the following:

19 “The ‘WIPO Performances and Phonograms  
20 Treaty’ is the WIPO Performances and Phonograms  
21 Treaty concluded at Geneva, Switzerland, on Decem-  
22 ber 20, 1996.”; and

23 (8) by inserting after the definition of “work  
24 made for hire” the following:

1           “The terms ‘WTO Agreement’ and ‘WTO mem-  
2           ber country’ have the meanings given those terms in  
3           paragraphs (9) and (10), respectively, of section 2 of  
4           the Uruguay Round Agreements Act.”.

5           (b) SUBJECT MATTER OF COPYRIGHT; NATIONAL  
6           ORIGIN.—Section 104 of title 17, United States Code, is  
7           amended—

8           (1) in subsection (b)—

9           (A) in paragraph (1) by striking “foreign  
10           nation that is a party to a copyright treaty to  
11           which the United States is also a party” and in-  
12           serting “treaty party”;

13           (B) in paragraph (2) by striking “party to  
14           the Universal Copyright Convention” and in-  
15           serting “treaty party”;

16           (C) by redesignating paragraph (5) as  
17           paragraph (6);

18           (D) by redesignating paragraph (3) as  
19           paragraph (5) and inserting it after paragraph  
20           (4);

21           (E) by inserting after paragraph (2) the  
22           following:

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

1 (F) in paragraph (4) by striking “Berne  
2 Convention work” and inserting “pictorial,  
3 graphic, or sculptural work that is incorporated  
4 in a building or other structure, or an architec-  
5 tural work that is embodied in a building and  
6 the building or structure is located in the  
7 United States or a treaty party”; and

8 (G) by inserting after paragraph (6), as so  
9 redesignated, the following:

10 “For purposes of paragraph (2), a work that is published  
11 in the United States or a treaty party within 30 days after  
12 publication in a foreign nation that is not a treaty party  
13 shall be considered to be first published in the United  
14 States or such treaty party, as the case may be.”; and

15 (2) by adding at the end the following new sub-  
16 section:

17 “(d) EFFECT OF PHONOGRAMS TREATIES.—Not-  
18 withstanding the provisions of subsection (b), no works  
19 other than sound recordings shall be eligible for protection  
20 under this title solely by virtue of the adherence of the  
21 United States to the Geneva Phonograms Convention or  
22 the WIPO Performances and Phonograms Treaty.”.

23 (e) COPYRIGHT IN RESTORED WORKS.—Section  
24 104A(h) of title 17, United States Code, is amended—



1 (1) in paragraph (1), by striking subparagraphs  
2 (A) and (B) and inserting the following:

3 “(A) a nation adhering to the Berne Con-  
4 vention;

5 “(B) a WTO member country;

6 “(C) a nation adhering to the WIPO Copy-  
7 right Treaty;

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

10 “(E) subject to a Presidential proclamation  
11 under subsection (g).”;

12 (2) by amending paragraph (3) to read as fol-  
13 lows:

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

16 “(A) becomes a WTO member country  
17 after the date of the enactment of the Uruguay  
18 Round Agreements Act;

19 “(B) on such date of enactment is, or after  
20 such date of enactment becomes, a nation ad-  
21 hering to the Berne Convention;

22 “(C) adheres to the WIPO Copyright  
23 Treaty;

24 “(D) adheres to the WIPO Performances  
25 and Phonograms Treaty; or

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

4 (3) in paragraph (6)—

5 (A) in subparagraph (C)(iii) by striking  
6 “and” after the semicolon;

7 (B) at the end of subparagraph (D) by  
8 striking the period and inserting “; and”; and

9 (C) by adding after subparagraph (D) the  
10 following:

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

15 (4) in paragraph (8)(B)(i)—

16 (A) by inserting “of which” before “the  
17 majority”; and

18 (B) by striking “of eligible countries”; and

19 (5) by striking paragraph (9).

20 (d) REGISTRATION AND INFRINGEMENT ACTIONS.—

21 Section 411(a) of title 17, United States Code, is amended  
22 in the first sentence—

23 (1) by striking “actions for infringement of  
24 copyright in Berne Convention works whose country  
25 of origin is not the United States and”; and



1       “(B)(i) The prohibition contained in subparagraph  
2 (A) shall not apply to persons with respect to a copy-  
3 righted work which is in a particular class of works and  
4 to which such persons have gained initial lawful access,  
5 if such persons are, or are likely to be in the succeeding  
6 3-year period, adversely affected by virtue of such prohibi-  
7 tion in their ability to make noninfringing uses of that  
8 particular class of works under this title, as determined  
9 under subparagraph (C).

10       “(ii) The prohibition contained in subparagraph (A)  
11 shall not apply to nonprofit libraries, archives, or edu-  
12 cational institutions, or to any entity described in section  
13 501(c)(3), (4), or (6) of the Internal Revenue Code of  
14 1986 that is exempt from tax under section 501(a) of such  
15 Code, with respect to a particular class of works, if such  
16 entities are, or are likely to be in the succeeding 3-year  
17 period, adversely affected by virtue of such prohibition in  
18 their ability to make noninfringing uses of that particular  
19 class of works under this title, as determined under sub-  
20 paragraph (C).

21       “(C) During the 2-year period described in subpara-  
22 graph (A), and during each succeeding 3-year period, the  
23 Secretary of Commerce, in consultation with the Under  
24 Secretary of Commerce for Intellectual Property Policy,  
25 the Assistant Secretary of Commerce for Communications

1 and Information, and the Register of Copyrights, shall  
2 conduct a rulemaking on the record to make the deter-  
3 mination for purposes of subparagraph (B) of whether  
4 nonprofit libraries, archives, or educational institutions  
5 and other entities described in subparagraph (B) or per-  
6 sons who have gained initial lawful access to a copyrighted  
7 work are, or are likely to be in the succeeding 3-year pe-  
8 riod, adversely affected by the prohibition under subpara-  
9 graph (A) in their ability to make noninfringing uses  
10 under this title of a particular class of copyrighted works.  
11 In conducting such rulemaking, the Secretary shall exam-  
12 ine—

13           “(i) the availability for use of copyrighted  
14       works;

15           “(ii) the availability for use of works for non-  
16       profit archival, preservation, and educational pur-  
17       poses;

18           “(iii) the impact of the prohibition on the cir-  
19       cumvention of technological measures applied to  
20       copyrighted works on criticism, comment, news re-  
21       porting, teaching, scholarship, or research;

22           “(iv) the effect of circumvention of techno-  
23       logical measures on the market for or value of copy-  
24       righted works; and

1           “(v) such other factors as the Secretary, in con-  
2           sultation with the Under Secretary of Commerce for  
3           Intellectual Property Policy, the Assistant Secretary  
4           of Commerce for Communications and Information,  
5           and the Register of Copyrights, considers appro-  
6           priate.

7           “(D) The Secretary shall publish any class of copy-  
8           righted works for which the Secretary has determined,  
9           pursuant to the rulemaking conducted under subpara-  
10          graph (C), that noninfringing uses by nonprofit libraries,  
11          archives, or educational institutions and other entities de-  
12          scribed in subparagraph (B) or by persons who have  
13          gained initial lawful access to a copyrighted work are, or  
14          are likely to be, adversely affected, and the prohibition  
15          contained in subparagraph (A) shall not apply to such en-  
16          tities with respect to such class of works, or to such per-  
17          sons with respect to such copyrighted work, for the ensu-  
18          ing 3-year period.

19          “(E) Neither the exception under subparagraph (B)  
20          from the applicability of the prohibition contained in sub-  
21          paragraph (A), nor any determination made in a rule-  
22          making conducted under subparagraph (C), may be used  
23          as a defense in any action to enforce any provision of this  
24          title other than this paragraph.

1       “(2) No person shall manufacture, import, offer to  
2 the public, provide, or otherwise traffic in any technology,  
3 product, service, device, component, or part thereof,  
4 that—

5               “(A) is primarily designed or produced for the  
6 purpose of circumventing a technological measure  
7 that effectively controls access to a work protected  
8 under this title;

9               “(B) has only limited commercially significant  
10 purpose or use other than to circumvent a techno-  
11 logical measure that effectively controls access to a  
12 work protected under this title; 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 a technological  
16 measure that effectively controls access to a work  
17 protected under this title.

18       “(3) As used in this subsection—

19               “(A) to ‘circumvent a technological measure’  
20 means to descramble a scrambled work, to decrypt  
21 an encrypted work, or otherwise to avoid, bypass, re-  
22 move, deactivate, or impair a technological measure,  
23 without the authority of the copyright owner; and

24               “(B) a technological measure ‘effectively con-  
25 trols access to a work’ if the measure, in the ordi-

1 nary course of its operation, requires the application  
2 of information, or a process or a treatment, with the  
3 authority of the copyright owner, to gain access to  
4 the work.

5 “(b) ADDITIONAL VIOLATIONS.—(1) No person shall  
6 manufacture, import, offer to the public, provide, or other-  
7 wise traffic in any technology, product, service, device,  
8 component, or part thereof, that—

9 “(A) is primarily designed or produced for the  
10 purpose of circumventing protection afforded by a  
11 technological measure that effectively protects a  
12 right of a copyright owner under this title in a work  
13 or a portion thereof;

14 “(B) has only limited commercially significant  
15 purpose or use other than to circumvent protection  
16 afforded by a technological measure that effectively  
17 protects a right of a copyright owner under this title  
18 in a work or a portion thereof; or

19 “(C) is marketed by that person or another act-  
20 ing in concert with that person with that person’s  
21 knowledge for use in circumventing protection af-  
22 farded by a technological measure that effectively  
23 protects a right of a copyright owner under this title  
24 in a work or a portion thereof.

25 “(2) As used in this subsection—



1           “(A) to ‘circumvent protection afforded by a  
2           technological measure’ means avoiding, bypassing,  
3           removing, deactivating, or otherwise impairing a  
4           technological measure; and

5           “(B) a technological measure ‘effectively pro-  
6           tects a right of a copyright owner under this title’  
7           if the measure, in the ordinary course of its oper-  
8           ation, prevents, restricts, or otherwise limits the ex-  
9           ercise of a right of a copyright owner under this  
10          title.

11          “(c) OTHER RIGHTS, ETC., NOT AFFECTED.—(1)  
12          Nothing in this section shall affect rights, remedies, limi-  
13          tations, or defenses to copyright infringement, including  
14          fair use, under this title.

15          “(2) Nothing in this section shall enlarge or diminish  
16          vicarious or contributory liability for copyright infringe-  
17          ment in connection with any technology, product, service,  
18          device, component, or part thereof.

19          “(3) Nothing in this section shall require that the de-  
20          sign of, or design and selection of parts and components  
21          for, a consumer electronics, telecommunications, or com-  
22          puting product provide for a response to any particular  
23          technological measure.

24          “(4) Nothing in this section shall enlarge or diminish  
25          any rights of free speech or the press for activities using

1 consumer electronics, telecommunications, or computing  
2 products.

3 “(d) EXEMPTION FOR NONPROFIT LIBRARIES, AR-  
4 CHIVES, AND EDUCATIONAL INSTITUTIONS.—(1) A non-  
5 profit library, archives, or educational institution which  
6 gains access to a commercially exploited copyrighted work  
7 solely in order to make a good faith determination of  
8 whether to acquire a copy of that work for the sole purpose  
9 of engaging in conduct permitted under this title shall not  
10 be in violation of subsection (a)(1)(A). A copy of a work  
11 to which access has been gained under this paragraph—

12 “(A) may not be retained longer than necessary  
13 to make such good faith determination; and

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

15 “(2) The exemption made available under paragraph  
16 (1) shall only apply with respect to a work when an iden-  
17 tical copy of that work is not reasonably available in an-  
18 other form.

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

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

1           “(B) shall, for repeated or subsequent offenses,  
2           in addition to the civil remedies under section 1203,  
3           forfeit the exemption provided under paragraph (1).

4           “(4) This subsection may not be used as a defense  
5           to a claim under subsection (a)(2) or (b), nor may this  
6           subsection permit a nonprofit library, archives, or edu-  
7           cational institution to manufacture, import, offer to the  
8           public, provide, or otherwise traffic in any technology,  
9           product, service, component, or part thereof, which cir-  
10          cumvents a technological measure.

11          “(5) In order for a library or archives to qualify for  
12          the exemption under this subsection, the collections of that  
13          library or archives shall be—

14                 “(A) open to the public; or

15                 “(B) available not only to researchers affiliated  
16                 with the library or archives or with the institution  
17                 of which it is a part, but also to other persons doing  
18                 research in a specialized field.

19          “(e) LAW ENFORCEMENT AND INTELLIGENCE AC-  
20          TIVITIES.—This section does not prohibit any lawfully au-  
21          thorized investigative, protective, or intelligence activity of  
22          an officer, agent, or employee of the United States, a  
23          State, or a political subdivision of a State, or a person  
24          acting pursuant to a contract with the United States, a  
25          State, or a political subdivision of a State.

1       “(f) REVERSE ENGINEERING.—(1) Notwithstanding  
2 the provisions of subsection (a)(1)(A), a person who has  
3 lawfully obtained the right to use a copy of a computer  
4 program may circumvent a technological measure that ef-  
5 fectively controls access to a particular portion of that pro-  
6 gram for the sole purpose of identifying and analyzing  
7 those elements of the program that are necessary to  
8 achieve interoperability of an independently created com-  
9 puter program with other programs, and that have not  
10 previously been readily available to the person engaging  
11 in the circumvention, to the extent any such acts of identi-  
12 fication and analysis do not constitute infringement under  
13 this title.

14       “(2) Notwithstanding the provisions of subsections  
15 (a)(2) and (b), a person may develop and employ techno-  
16 logical means to circumvent a technological measure, or  
17 to circumvent protection afforded by a technological meas-  
18 ure, in order for that person to make the identification  
19 and analysis permitted under paragraph (1), or for the  
20 limited purpose of that person achieving interoperability  
21 of an independently created computer program with other  
22 programs, if such means are necessary to achieve such  
23 interoperability, to the extent that doing so does not con-  
24 stitute infringement under this title.

1       “(3) The information acquired through the acts per-  
2 mitted under paragraph (1), and the means permitted  
3 under paragraph (2), may be made available to others if  
4 the person referred to in paragraphs (1) and (2) provides  
5 such information or means solely for the purpose of  
6 achieving interoperability of an independently created  
7 computer program with other programs, and to the extent  
8 that doing so does not constitute infringement under this  
9 title or violate other applicable law.

10       “(4) For purposes of this subsection, the term ‘inter-  
11 operability’ means the ability of computer programs to ex-  
12 change information, and of such programs mutually to use  
13 the information which has been exchanged.

14       “(g) ENCRYPTION RESEARCH.—

15               “(1) DEFINITIONS.—For purposes of this sub-  
16 section—

17                       “(A) the term ‘encryption research’ means  
18 activities necessary to identify and analyze  
19 flaws and vulnerabilities of encryption tech-  
20 nologies applied to copyrighted works, if these  
21 activities are conducted to advance the state of  
22 knowledge in the field of encryption technology  
23 or to assist in the development of encryption  
24 products; and

1           “(B) the term ‘encryption technology’  
2 means the scrambling and descrambling of in-  
3 formation using mathematical formulas or algo-  
4 rithms.

5           “(2) PERMISSIBLE ACTS OF ENCRYPTION RE-  
6 SEARCH.—Notwithstanding the provisions of sub-  
7 section (a)(1)(A), it is not a violation of that sub-  
8 section for a person to circumvent a technological  
9 measure as applied to a copy, phonorecord, perform-  
10 ance, or display of a published work in the course  
11 of an act of good faith encryption research if—

12           “(A) the person lawfully obtained the  
13 encrypted copy, phonorecord, performance, or  
14 display of the published work;

15           “(B) such act is necessary to conduct such  
16 encryption research;

17           “(C) the person made a good faith effort  
18 to obtain authorization before the circumven-  
19 tion; and

20           “(D) such act does not constitute infringe-  
21 ment under this title or a violation of applicable  
22 law other than this section, including section  
23 1030 of title 18 and those provisions of title 18  
24 amended by the Computer Fraud and Abuse  
25 Act of 1986.

1           “(3) FACTORS IN DETERMINING EXEMPTION.—

2           In determining whether a person qualifies for the ex-  
3           emption under paragraph (2), the factors to be con-  
4           sidered shall include—

5                   “(A) whether the information derived from  
6                   the encryption research was disseminated, and  
7                   if so, whether it was disseminated in a manner  
8                   reasonably calculated to advance the state of  
9                   knowledge or development of encryption tech-  
10                  nology, versus whether it was disseminated in a  
11                  manner that facilitates infringement under this  
12                  title or a violation of applicable law other than  
13                  this section, including a violation of privacy or  
14                  breach of security;

15                   “(B) whether the person is engaged in a  
16                   legitimate course of study, is employed, or is  
17                   appropriately trained or experienced, in the  
18                   field of encryption technology; and

19                   “(C) whether the person provides the copy-  
20                   right owner of the work to which the techno-  
21                   logical measure is applied with notice of the  
22                   findings and documentation of the research,  
23                   and the time when such notice is provided.

24           “(4) USE OF TECHNOLOGICAL MEANS FOR RE-  
25           SEARCH ACTIVITIES.—Notwithstanding the provi-

1 sions of subsection (a)(2), it is not a violation of  
2 that subsection for a person to—

3 “(A) develop and employ technological  
4 means to circumvent a technological measure  
5 for the sole purpose of that person performing  
6 the acts of good faith encryption research de-  
7 scribed in paragraph (2); and

8 “(B) provide the technological means to  
9 another person with whom he or she is working  
10 collaboratively for the purpose of conducting the  
11 acts of good faith encryption research described  
12 in paragraph (2) or for the purpose of having  
13 that other person verify his or her acts of good  
14 faith encryption research described in para-  
15 graph (2).

16 “(5) REPORT TO CONGRESS.—Not later than 1  
17 year after the date of the enactment of this chapter,  
18 the Under Secretary of Commerce for Intellectual  
19 Property Policy, the Assistant Secretary of Com-  
20 merce for Communications and Information, and the  
21 Register of Copyrights shall jointly report to the  
22 Congress on the effect this subsection has had on—

23 “(A) encryption research and the develop-  
24 ment of encryption technology;



1           “(B) the adequacy and effectiveness of  
2           technological measures designed to protect  
3           copyrighted works; and

4           “(C) protection of copyright owners  
5           against the unauthorized access to their  
6           encrypted copyrighted works.

7           The report shall include legislative recommendations,  
8           if any.

9           “(h) EXCPETIONS REGARDING MINORS.—(1) In ap-  
10          plying subsection (a) to a component or part, the court  
11          may consider the necessity for its intended and actual in-  
12          corporation in a technology, product, service, or device,  
13          which—

14                 “(A) does not itself violate the provisions of this  
15                 title; and

16                 “(B) has the sole purpose to prevent the access  
17                 of minors to material on the Internet.

18           “(2) Notwithstanding the provisions of subsection  
19          (a)(1)(A), it is not a violation of that subsection for a par-  
20          ent to circumvent a technological measure that effectively  
21          controls access to a test, examination, or other evaluation  
22          of his or her minor child’s abilities that is given by a non-  
23          profit educational institution if—

24                 “(A) the parent made a good faith effort to ob-  
25                 tain authorization before the circumvention; and

1           “(B) such act is necessary to obtain a copy of  
2 such test, examination, or other evaluation.

3           “(i) PROTECTION OF PERSONALLY IDENTIFYING IN-  
4 FORMATION.—

5           (1) CIRCUMVENTION PERMITTED.—Notwith-  
6 standing the provisions of subsection (a)(1)(A), it is  
7 not a violation of that subsection for a person to cir-  
8 cumvent a technological measure that effectively  
9 controls access to a work protected under this title,  
10 if—

11           “(A) the technological measure, or the  
12 work it protects, contains the capability of col-  
13 lecting or disseminating personally identifying  
14 information reflecting the online activities of a  
15 natural person who seeks to gain access to the  
16 work protected;

17           “(B) in the normal course of its operation,  
18 the technological measure, or the work it pro-  
19 tects, collects or disseminates personally identi-  
20 fying information about the person who seeks to  
21 gain access to the work protected, without pro-  
22 viding conspicuous notice of such collection or  
23 dissemination to such person, and without pro-  
24 viding such person with the capability to pre-  
25 vent or restrict such collection or dissemination;

1           “(C) the act of circumvention has the sole  
2 effect of identifying and disabling the capability  
3 described in subparagraph (A), and has no  
4 other effect on the ability of any person to gain  
5 access to any work; and

6           “(D) the act of circumvention is carried  
7 out solely for the purpose of preventing the col-  
8 lection or dissemination of personally identify-  
9 ing information about a natural person who  
10 seeks to gain access to the work protected, and  
11 is not in violation of any other law.

12           “(2) INAPPLICABILITY TO CERTAIN TECHNO-  
13 LOGICAL MEASURES.—This subsection does not  
14 apply to a technological measure, or a work it pro-  
15 tects, that does not collect or disseminate personally  
16 identifying information and that is disclosed to a  
17 user as not having or using such capability.

18 **“§ 1202. Integrity of copyright management informa-**  
19 **tion**

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

23           “(1) provide copyright management information  
24 that is false, or

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

3           “(b) REMOVAL OR ALTERATION OF COPYRIGHT  
4           MANAGEMENT INFORMATION.—No person shall, without  
5           the authority of the copyright owner or the law—

6           “(1) intentionally remove or alter any copyright  
7           management information,

8           “(2) distribute or import for distribution copy-  
9           right management information knowing that the  
10          copyright management information has been re-  
11          moved or altered without authority of the copyright  
12          owner or the law, or

13          “(3) distribute, import for distribution, or pub-  
14          licly perform works, copies of works, or  
15          phonorecords, knowing that copyright management  
16          information has been removed or altered without au-  
17          thority of the copyright owner or the law,

18          knowing, or, with respect to civil remedies under section  
19          1203, having reasonable grounds to know, that it will in-  
20          duce, enable, facilitate, or conceal an infringement of any  
21          right under this title.

22          “(c) DEFINITION.—As used in this section, the term  
23          ‘copyright management information’ means any of the fol-  
24          lowing information conveyed in connection with copies or  
25          phonorecords of a work or performances or displays of a

1 work, including in digital form, except that such term does  
2 not include any personally identifying information about  
3 a user of a work or of a copy, phonorecord, performance,  
4 or display of a work:

5           “(1) The title and other information identifying  
6 the work, including the information set forth on a  
7 notice of copyright.

8           “(2) The name of, and other identifying infor-  
9 mation about, the author of a work.

10           “(3) The name of, and other identifying infor-  
11 mation about, the copyright owner of the work, in-  
12 cluding the information set forth in a notice of copy-  
13 right.

14           “(4) With the exception of public performances  
15 of works by radio and television broadcast stations,  
16 the name of, and other identifying information  
17 about, a performer whose performance is fixed in a  
18 work other than an audiovisual work.

19           “(5) With the exception of public performances  
20 of works by radio and television broadcast stations,  
21 in the case of an audiovisual work, the name of, and  
22 other identifying information about, a writer, per-  
23 former, or director who is credited in the audiovisual  
24 work.

25           “(6) Terms and conditions for use of the work.

1           “(7) Identifying numbers or symbols referring  
2           to such information or links to such information.

3           “(8) Such other information as the Register of  
4           Copyrights may prescribe by regulation, except that  
5           the Register of Copyrights may not require the pro-  
6           vision of any information concerning the user of a  
7           copyrighted work.

8           “(d) LAW ENFORCEMENT AND INTELLIGENCE AC-  
9           TIVITIES.—This section does not prohibit any lawfully au-  
10          thorized investigative, protective, or intelligence activity of  
11          an officer, agent, or employee of the United States, a  
12          State, or a political subdivision of a State, or a person  
13          acting pursuant to a contract with the United States, a  
14          State, or a political subdivision of a State.

15          “(e) LIMITATIONS ON LIABILITY.—

16                 “(1) ANALOG TRANSMISSIONS.—In the case of  
17                 an analog transmission, a person who is making  
18                 transmissions in its capacity as a broadcast station,  
19                 or as a cable system, or someone who provides pro-  
20                 gramming to such station or system, shall not be lia-  
21                 ble for a violation of subsection (b) if—

22                         “(A) avoiding the activity that constitutes  
23                         such violation is not technically feasible or  
24                         would create an undue financial hardship on  
25                         such person; and

1           “(B) such person did not intend, by engag-  
2           ing in such activity, to induce, enable, facilitate,  
3           or conceal infringement of a right under this  
4           title.

5           “(2) DIGITAL TRANSMISSIONS.—

6           “(A) If a digital transmission standard for  
7           the placement of copyright management infor-  
8           mation for a category of works is set in a vol-  
9           untary, consensus standard-setting process in-  
10          volving a representative cross-section of broad-  
11          cast stations or cable systems and copyright  
12          owners of a category of works that are intended  
13          for public performance by such stations or sys-  
14          tems, a person identified in paragraph (1) shall  
15          not be liable for a violation of subsection (b)  
16          with respect to the particular copyright man-  
17          agement information addressed by such stand-  
18          ard if—

19                   “(i) the placement of such information  
20                   by someone other than such person is not  
21                   in accordance with such standard; and

22                   “(ii) the activity that constitutes such  
23                   violation is not intended to induce, enable,  
24                   facilitate, or conceal infringement of a  
25                   right under this title.

1           “(B) Until a digital transmission standard  
2           has been set pursuant to subparagraph (A) with  
3           respect to the placement of copyright manage-  
4           ment information for a category or works, a  
5           person identified in paragraph (1) shall not be  
6           liable for a violation of subsection (b) with re-  
7           spect to such copyright management informa-  
8           tion, if the activity that constitutes such viola-  
9           tion is not intended to induce, enable, facilitate,  
10          or conceal infringement of a right under this  
11          title, and if—

12                   “(i) the transmission of such informa-  
13                   tion by such person would result in a per-  
14                   ceptible visual or aural degradation of the  
15                   digital signal; or

16                   “(ii) the transmission of such infor-  
17                   mation by such person would conflict  
18                   with—

19                           “(I) an applicable government  
20                           regulation relating to transmission of  
21                           information in a digital signal;

22                           “(II) an applicable industry-wide  
23                           standard relating to the transmission  
24                           of information in a digital signal that  
25                           was adopted by a voluntary consensus



1 standards body prior to the effective  
2 date of this chapter; or

3 “(III) an applicable industry-wide  
4 standard relating to the transmission  
5 of information in a digital signal that  
6 was adopted in a voluntary, consensus  
7 standards-setting process open to par-  
8 ticipation by a representative cross-  
9 section of broadcast stations or cable  
10 systems and copyright owners of a  
11 category of works that are intended  
12 for public performance by such sta-  
13 tions or systems.

14 “(3) DEFINITIONS.—As used in this sub-  
15 section—

16 “(A) the term ‘broadcast station’ has the  
17 meaning given that term in section 3 of the  
18 Communications Act of 1934 (47 U.S.C. 153));  
19 and

20 “(B) the term ‘cable system’ has the mean-  
21 ing given that term in section 602 of the Com-  
22 munications Act of 1934 (47 U.S.C. 522)).

23 **“§ 1203. Civil remedies**

24 “(a) CIVIL ACTIONS.—Any person injured by a viola-  
25 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  
7 prevent or restrain a violation, but in no event shall  
8 impose a prior restraint on free speech or the press  
9 protected under the 1st amendment to the Constitu-  
10 tion;

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

17 “(3) may award damages under subsection (c);

18 “(4) in its discretion may allow the recovery of  
19 costs by or against any party other than the United  
20 States or an officer thereof;

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

23 “(6) may, as part of a final judgment or decree  
24 finding a violation, order the remedial modification  
25 or the destruction of any device or product involved

1 in the violation that is in the custody or control of  
2 the violator or has been impounded under paragraph  
3 (2).

4 “(c) AWARD OF DAMAGES.—

5 “(1) IN GENERAL.—Except as otherwise pro-  
6 vided in this title, a person committing a violation  
7 of section 1201 or 1202 is liable for either—

8 “(A) the actual damages and any addi-  
9 tional profits of the violator, as provided in  
10 paragraph (2), or

11 “(B) statutory damages, as provided in  
12 paragraph (3).

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

21 “(3) STATUTORY DAMAGES.—(A) At any time  
22 before final judgment is entered, a complaining  
23 party may elect to recover an award of statutory  
24 damages for each violation of section 1201 in the  
25 sum of not less than \$200 or more than \$2,500 per

1 act of circumvention, device, product, component,  
2 offer, or performance of service, as the court consid-  
3 ers just.

4 “(B) At any time before final judgment is en-  
5 tered, a complaining party may elect to recover an  
6 award of statutory damages for each violation of sec-  
7 tion 1202 in the sum of not less than \$2,500 or  
8 more than \$25,000.

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

17 “(5) INNOCENT VIOLATIONS.—

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

1           “(B) NONPROFIT LIBRARY, ARCHIVES, OR  
2           EDUCATIONAL INSTITUTIONS.—In the case of a  
3           nonprofit library, archives, or educational insti-  
4           tution, the court shall remit damages in any  
5           case in which the library, archives, or edu-  
6           cational institution sustains the burden of prov-  
7           ing, and the court finds, that the library, ar-  
8           chives, or educational institution was not aware  
9           and had no reason to believe that its acts con-  
10          stituted a violation.

11   **“§ 1204. Criminal offenses and penalties**

12          “(a) IN GENERAL.—Any person who violates section  
13   1201 or 1202 willfully and for purposes of commercial ad-  
14   vantage or private financial gain—

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

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

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



1 of rights under title 17, United States Code. Accordingly,  
2 the expeditious implementation of such measures, devel-  
3 oped by the private sector is a key factor in realizing the  
4 full benefits of making available copyrighted works  
5 through digital networks, including the benefits set forth  
6 in this section.

7 (b) TECHNOLOGICAL MEASURES.—The technological  
8 measures referred to in subsection (a) shall include, but  
9 not be limited to, those which—

10 (1) enable nonprofit libraries, for nonprofit pur-  
11 poses, to continue to lend to library users copies or  
12 phonorecords that such libraries have lawfully ac-  
13 quired, including the lending of such copies or  
14 phonorecords in digital formats in a manner that  
15 prevents infringement;

16 (2) effectively protect against the infringement  
17 of exclusive rights under title 17, United States  
18 Code, and facilitate the exercise of those exclusive  
19 rights; and

20 (3) promote the development and implementa-  
21 tion of diverse methods, mechanisms, and arrange-  
22 ments in the marketplace for making available copy-  
23 righted works in digital formats which provide op-  
24 portunities for individual members of the public to

1 make lawful uses of copyrighted works in digital for-  
2 mats.

3 (c) PROCEDURES FOR DEVELOPING AND IMPLE-  
4 MENTING TECHNOLOGICAL MEASURES.—The techno-  
5 logical measures whose development and implementation  
6 the Congress anticipates include, but are not limited to,  
7 those which—

8 (1) are developed pursuant to a broad consen-  
9 sus in an open, fair, voluntary, and multi-industry  
10 process;

11 (2) are made available on reasonable and non-  
12 discriminatory terms; and

13 (3) do not impose substantial costs or burdens  
14 on copyright owners or on manufacturers of hard-  
15 ware or software used in conjunction with copy-  
16 righted works in digital formats.

17 (d) OVERSIGHT AND REPORTING.—(1) The Under  
18 Secretary of Commerce for Intellectual Property Policy,  
19 the Assistant Secretary of Commerce for Communications  
20 and Information, and the Register of Copyrights shall  
21 jointly review the impact of the enactment of section 1201  
22 of title 17, United States Code, on the access of individual  
23 users to copyrighted works in digital formats and shall  
24 jointly report annually thereon to the Committees on the  
25 Judiciary and on Commerce of the House of Representa-



1 tives and the Committees on the Judiciary and on Com-  
2 merce, Science, and Transportation of the Senate.

3 (2) Each report under paragraph (1) shall address  
4 the following issues:

5 (A) The status of the development and imple-  
6 mentation of technological measures described in  
7 this section, including measures that advance the ob-  
8 jectives of this section, and the effectiveness of such  
9 technological measures in protecting the private  
10 property interests of copyright owners under title  
11 17, United States Code.

12 (B) The degree to which individual lawful users  
13 of copyrighted works—

14 (i) have access to the Internet and digital  
15 networks generally;

16 (ii) are dependent upon such access for  
17 their use of copyrighted works;

18 (iii) have available to them other channels  
19 for obtaining and using copyrighted works,  
20 other than the Internet and digital networks  
21 generally;

22 (iv) are required to pay copyright owners  
23 or intermediaries for each lawful use of copy-  
24 righted works in digital formats to which they  
25 have access; and

1           (v) are able to utilize nonprofit libraries to  
2           obtain access, through borrowing without pay-  
3           ment by the user, to copyrighted works in digi-  
4           tal formats.

5           (C) The degree to which infringement of copy-  
6           righted works in digital formats is occurring.

7           (D) Whether and the extent to which section  
8           1201 of title 17, United States Code, is asserted as  
9           a basis for liability in claims brought against per-  
10          sons conducting research and development, including  
11          reverse engineering of copyrighted works, and the  
12          extent to which such claims constitute a serious im-  
13          pediment to the development and production of com-  
14          petitive goods and services.

15          (E) The degree to which individual users of  
16          copyrighted materials in digital formats are able ef-  
17          fectively to protect themselves against the use of  
18          technological measures to carry out or facilitate the  
19          undisclosed collection and dissemination of person-  
20          ally identifying information concerning the access to  
21          and use of such materials by such users.

22          (F) Such other issues as the Under Secretary  
23          of Commerce for Intellectual Property Policy, the  
24          Assistant Secretary of Commerce for Communica-  
25          tions and Information, and the Register of Copy-

1 rights identify as relevant to the impact of the en-  
2 actment of section 1201 of title 17, United States  
3 Code, on the access of individual users to copy-  
4 righted works in digital formats.

5 (3) The first report under this subsection shall be  
6 submitted not later than one year after the date of the  
7 enactment of this Act, and the last such report shall be  
8 submitted not later than three years after the date of the  
9 enactment of this Act.

10 (4) The reports under this subsection may include  
11 such recommendations for additional legislative action as  
12 the Under Secretary of Commerce for Intellectual Prop-  
13 erty Policy, the Assistant Secretary of Commerce for Com-  
14 munications and Information, and the Register of Copy-  
15 rights consider advisable in order to further the objectives  
16 of this section.

17 **SEC. 105. EVALUATION OF IMPACT OF COPYRIGHT LAW**  
18 **AND AMENDMENTS ON ELECTRONIC COM-**  
19 **MERCE AND TECHNOLOGICAL DEVELOP-**  
20 **MENT.**

21 (a) **EVALUATION BY UNDER SECRETARY OF COM-**  
22 **MERCE AND REGISTER OF COPYRIGHTS.**—The Under Sec-  
23 retary of Commerce for Intellectual Property Policy, the  
24 Assistant Secretary of Commerce for Communications and

1 Information, and the Register of Copyrights shall jointly  
2 evaluate—

3           (1) the effects of the amendments made by this  
4 title and the development of electronic commerce  
5 and associated technology on the operation of sec-  
6 tions 109 and 117 of title 17, United States Code;  
7 and

8           (2) the relationship between existing and emer-  
9 gent technology and the operation of sections 109  
10 and 117 of title 17, United States Code.

11       (c) REPORT TO CONGRESS.—The Under Secretary of  
12 Commerce for Intellectual Property Policy, the Assistant  
13 Secretary of Commerce for Communications and Informa-  
14 tion, and the Register of Copyrights shall, not later than  
15 24 months after the date of the enactment of this Act,  
16 submit to the Congress a joint report on the evaluation  
17 conducted under subsection (b), including any legislative  
18 recommendations the Under Secretary, the Assistant Sec-  
19 retary, and the Register may have.

20 **SEC. 106. EFFECTIVE DATE.**

21       (a) IN GENERAL.—Subject to subsection (b), this  
22 title and the amendments made by this title shall take ef-  
23 fect on the date of the enactment of this Act.

24       (b) AMENDMENTS RELATING TO CERTAIN INTER-  
25 NATIONAL AGREEMENTS.—(1) The following shall take ef-

1 fect upon the entry into force of the WIPO Copyright  
2 Treaty with respect to the United States:

3 (A) Paragraph (5) of the definition of “inter-  
4 national agreement” contained in section 101 of title  
5 17, United States Code, as amended by section  
6 102(a)(4) of this Act.

7 (B) The amendment made by section 102(a)(6)  
8 of this Act.

9 (C) Subparagraph (C) of section 104A(h)(1) of  
10 title 17, United States Code, as amended by section  
11 102(c)(1) of this Act.

12 (D) Subparagraph (C) of section 104A(h)(3) of  
13 title 17, United States Code, as amended by section  
14 102(c)(2) of this Act.

15 (2) The following shall take effect upon the entry into  
16 force of the WIPO Performances and Phonograms Treaty  
17 with respect to the United States:

18 (A) Paragraph (6) of the definition of “inter-  
19 national agreement” contained in section 101 of title  
20 17, United States Code, as amended by section  
21 102(a)(4) of this Act.

22 (B) The amendment made by section 102(a)(7)  
23 of this Act.

24 (C) The amendment made by section 102(b)(2)  
25 of this Act.

1 (D) Subparagraph (D) of section 104A(h)(1) of  
2 title 17, United States Code, as amended by section  
3 102(c)(1) of this Act.

4 (E) Subparagraph (D) of section 104A(h)(3) of  
5 title 17, United States Code, as amended by section  
6 102(c)(2) of this Act.

7 (F) The amendments made by section 102(c)(3)  
8 of this Act.

9 **TITLE II—ONLINE COPYRIGHT**  
10 **INFRINGEMENT LIABILITY**  
11 **LIMITATION**

12 **SEC. 201. SHORT TITLE.**

13 This title may be cited as the “Online Copyright In-  
14 fringement Liability Limitation Act”.

15 **SEC. 202. LIMITATIONS ON LIABILITY FOR COPYRIGHT IN-**  
16 **FRINGEMENT.**

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

20 **“§ 512. Limitations on liability relating to material**  
21 **online**

22 **“(a) TRANSITORY DIGITAL NETWORK COMMUNICA-**  
23 **TIONS.—**A service provider shall not be liable for monetary  
24 relief, or, except as provided in subsection (i), for injunc-  
25 tive or other equitable relief, for infringement of copyright

1 by reason of the provider’s transmitting, routing, or pro-  
2 viding connections for, material through a system or net-  
3 work controlled or operated by or for the service provider,  
4 or by reason of the intermediate and transient storage of  
5 that material in the course of such transmitting, routing,  
6 or providing connections, if—

7           “(1) the transmission of the material was initi-  
8           ated by or at the direction of a person other than  
9           the service provider;

10           “(2) the transmission, routing, provision of con-  
11           nections, or storage is carried out through an auto-  
12           matic technical process without selection of the ma-  
13           terial by the service provider;

14           “(3) the service provider does not select the re-  
15           cipients of the material except as an automatic re-  
16           sponse to the request of another person;

17           “(4) no copy of the material made by the serv-  
18           ice provider in the course of such intermediate or  
19           transient storage is maintained on the system or  
20           network in a manner ordinarily accessible to anyone  
21           other than anticipated recipients, and no such copy  
22           is maintained on the system or network in a manner  
23           ordinarily accessible to such anticipated recipients  
24           for a longer period than is reasonably necessary for

1 the transmission, routing, or provision of connec-  
2 tions; and

3 “(5) the material is transmitted through the  
4 system or network without modification of its con-  
5 tent.

6 “(b) SYSTEM CACHING.—

7 “(1) LIMITATION ON LIABILITY.—A service pro-  
8 vider shall not be liable for monetary relief, or, ex-  
9 cept as provided in subsection (i), for injunctive or  
10 other equitable relief, for infringement of copyright  
11 by reason of the intermediate and temporary storage  
12 of material on a system or network controlled or op-  
13 erated by or for the service provider in a case in  
14 which—

15 “(A) the material is made available online  
16 by a person other than the service provider,

17 “(B) the material is transmitted from the  
18 person described in subparagraph (A) through  
19 the system or network to a person other than  
20 the person described in subparagraph (A) at  
21 the direction of that other person, and

22 “(C) the storage is carried out through an  
23 automatic technical process for the purpose of  
24 making the material available to users of the  
25 system or network who, after the material is



1 transmitted as described in subparagraph (B),  
2 request access to the material from the person  
3 described in subparagraph (A),  
4 if the conditions set forth in paragraph (2) are met.

5 (2) CONDITIONS.—The conditions referred to in  
6 paragraph (1) are that—

7 “(A) the material described in paragraph  
8 (1) is transmitted to the subsequent users de-  
9 scribed in paragraph (1)(C) without modifica-  
10 tion to its content from the manner in which  
11 the material was transmitted from the person  
12 described in paragraph (1)(A);

13 “(B) the service provider described in  
14 paragraph (1) complies with rules concerning  
15 the refreshing, reloading, or other updating of  
16 the material when specified by the person mak-  
17 ing the material available online in accordance  
18 with a generally accepted industry standard  
19 data communications protocol for the system or  
20 network through which that person makes the  
21 material available, except that this subpara-  
22 graph applies only if those rules are not used  
23 by the person described in paragraph (1)(A) to  
24 prevent or unreasonably impair the intermedi-  
25 ate storage to which this subsection applies;

1           “(C) the service provider does not interfere  
2 with the ability of technology associated with  
3 the material to return to the person described  
4 in paragraph (1)(A) the information that would  
5 have been available to that person if the mate-  
6 rial had been obtained by the subsequent users  
7 described in paragraph (1)(C) directly from  
8 that person, except that this subparagraph ap-  
9 plies only if that technology—

10           “(i) does not significantly interfere  
11 with the performance of the provider’s sys-  
12 tem or network or with the intermediate  
13 storage of the material;

14           “(ii) is consistent with generally ac-  
15 cepted industry standard communications  
16 protocols; and

17           “(iii) does not extract information  
18 from the provider’s system or network  
19 other than the information that would have  
20 been available to the person described in  
21 paragraph (1)(A) if the subsequent users  
22 had gained access to the material directly  
23 from that person;

24           “(D) if the person described in paragraph  
25 (1)(A) has in effect a condition that a person

1 must meet prior to having access to the mate-  
2 rial, such as a condition based on payment of  
3 a fee or provision of a password or other infor-  
4 mation, the service provider permits access to  
5 the stored material in significant part only to  
6 users of its system or network that have met  
7 those conditions and only in accordance with  
8 those conditions; and

9 “(E) if the person described in paragraph  
10 (1)(A) makes that material available online  
11 without the authorization of the copyright  
12 owner of the material, the service provider re-  
13 sponds expeditiously to remove, or disable ac-  
14 cess to, the material that is claimed to be in-  
15 fringing upon notification of claimed infringe-  
16 ment as described in subsection (c)(3), except  
17 that this subparagraph applies only if—

18 “(i) the material has previously been  
19 removed from the originating site or access  
20 to it has been disabled, or a court has or-  
21 dered that the material be removed from  
22 the originating site or that access to the  
23 material on the originating site be dis-  
24 abled; and

1           “(ii) the party giving the notification  
2 includes in the notification a statement  
3 confirming that the material has been re-  
4 moved from the originating site or access  
5 to it has been disabled or that a court has  
6 ordered that the material be removed from  
7 the originating site or that access to the  
8 material on the originating site be dis-  
9 abled.

10           “(c) INFORMATION RESIDING ON SYSTEMS OR  
11 NETWORKS AT DIRECTION OF USERS.—

12           “(1) IN GENERAL.—A service provider shall not  
13 be liable for monetary relief, or, except as provided  
14 in subsection (i), for injunctive or other equitable re-  
15 lief, for infringement of copyright by reason of the  
16 storage at the direction of a user of material that re-  
17 sides on a system or network controlled or operated  
18 by or for the service provider, if the service pro-  
19 vider—

20           “(A)(i) does not have actual knowledge  
21 that the material or an activity using the mate-  
22 rial on the system or network is infringing;

23           “(ii) in the absence of such actual knowl-  
24 edge, is not aware of facts or circumstances  
25 from which infringing activity is apparent; or

1           “(iii) upon obtaining such knowledge or  
2 awareness, acts expeditiously to remove, or dis-  
3 able access to, the material;

4           “(B) does not receive a financial benefit di-  
5 rectly attributable to the infringing activity, in  
6 a case in which the service provider has the  
7 right and ability to control such activity; and

8           “(C) upon notification of claimed infringe-  
9 ment as described in paragraph (4), responds  
10 expeditiously to remove, or disable access to,  
11 the material that is claimed to be infringing or  
12 to be the subject of infringing activity.

13           “(2) LIMITATION ON LIABILITY OF NONPROFIT  
14 EDUCATIONAL INSTITUTIONS.—A nonprofit edu-  
15 cational institution that is a service provider shall  
16 not be liable for monetary relief, or, except as pro-  
17 vided in subsection (i), for injunctive or other equi-  
18 table relief, by reason of the acts or omissions of a  
19 faculty member, administrative employee, student, or  
20 graduate student, unless such faculty member, ad-  
21 ministrative employee, student, or graduate student  
22 is exercising managerial or operational responsibil-  
23 ities that directly relate to the institution’s function  
24 as a service provider.

1           “(3) DESIGNATED AGENT.—The limitations on  
2 liability established in this subsection apply to a  
3 service provider only if the service provider has des-  
4 igned an agent to receive notifications of claimed  
5 infringement described in paragraph (4), by making  
6 available through its service, including on its website  
7 in a location accessible to the public, and by provid-  
8 ing to the Copyright Office, substantially the follow-  
9 ing information:

10                   “(A) the name, address, phone number,  
11                   and electronic mail address of the agent.

12                   “(B) other contact information which the  
13                   Register of Copyrights may deem appropriate.

14           The Register of Copyrights shall maintain a current  
15 directory of agents available to the public for inspec-  
16 tion, including through the Internet, in both elec-  
17 tronic and hard copy formats, and may require pay-  
18 ment of a fee by service providers to cover the costs  
19 of maintaining the directory.

20           “(4) ELEMENTS OF NOTIFICATION.—

21                   “(A) To be effective under this subsection,  
22 a notification of claimed infringement must be  
23 a written communication provided to the des-  
24 igned agent of a service provider that includes  
25 substantially the following:

1           “(i) A physical or electronic signature  
2 of a person authorized to act on behalf of  
3 the owner of an exclusive right that is al-  
4 legedly infringed.

5           “(ii) Identification of the copyrighted  
6 work claimed to have been infringed, or, if  
7 multiple copyrighted works at a single on-  
8 line site are covered by a single notifica-  
9 tion, a representative list of such works at  
10 that site.

11           “(iii) Identification of the material  
12 that is claimed to be infringing or to be  
13 the subject of infringing activity and that  
14 is to be removed or access to which is to  
15 be disabled, and information reasonably  
16 sufficient to permit the service provider to  
17 locate the material.

18           “(iv) Information reasonably sufficient  
19 to permit the service provider to contact  
20 the complaining party, such as an address,  
21 telephone number, and, if available, an  
22 electronic mail address at which the com-  
23 plaining party may be contacted.

24           “(v) A statement that the complaining  
25 party has a good faith belief that use of

1           the material in the manner complained of  
2           is not authorized by the copyright owner,  
3           its agent, or the law.

4           “(vi) A statement that the informa-  
5           tion in the notification is accurate, and  
6           under penalty of perjury, that the com-  
7           plaining party is authorized to act on be-  
8           half of the owner of an exclusive right that  
9           is allegedly infringed.

10          “(B)(i) Subject to clause (ii), a notification  
11          from a copyright owner or from a person au-  
12          thorized to act on behalf of the copyright owner  
13          that fails to comply substantially with the provi-  
14          sions of subparagraph (A) shall not be consid-  
15          ered under paragraph (1)(A) in determining  
16          whether a service provider has actual knowledge  
17          or is aware of facts or circumstances from  
18          which infringing activity is apparent.

19          “(ii) In a case in which the notification  
20          that is provided to the service provider’s des-  
21          ignated agent fails to comply substantially with  
22          all the provisions of subparagraph (A) but sub-  
23          stantially complies with clauses (ii), (iii), and  
24          (iv) of subparagraph (A), clause (i) of this sub-  
25          paragraph applies only if the service provider



1            promptly attempts to contact the person mak-  
2            ing the notification or takes other reasonable  
3            steps to assist in the receipt of notification that  
4            substantially complies with all the provisions of  
5            subparagraph (A).

6            “(d) INFORMATION LOCATION TOOLS.—A service  
7 provider shall not be liable for monetary relief, or, except  
8 as provided in subsection (i), for injunctive or other equi-  
9 table relief, for infringement of copyright by reason of the  
10 provider referring or linking users to an online location  
11 containing infringing material or infringing activity, by  
12 using information location tools, including a directory,  
13 index, reference, pointer, or hypertext link, if the service  
14 provider—

15            “(1)(A) does not have actual knowledge that  
16            the material or activity is infringing;

17            “(B) in the absence of such actual knowledge,  
18            is not aware of facts or circumstances from which  
19            infringing activity is apparent; or

20            “(C) upon obtaining such knowledge or aware-  
21            ness, acts expeditiously to remove, or disable access  
22            to, the material;

23            “(2) does not receive a financial benefit directly  
24            attributable to the infringing activity, in a case in

1 which the service provider has the right and ability  
2 to control such activity; and

3 “(3) upon notification of claimed infringement  
4 as described in subsection (c)(4), responds expedi-  
5 tiously to remove, or disable access to, the material  
6 that is claimed to be infringing or to be the subject  
7 of infringing activity, except that, for purposes of  
8 this paragraph, the information described in sub-  
9 section (c)(4)(A)(iii) shall be identification of the  
10 reference or link, to material or activity claimed to  
11 be infringing, that is to be removed or access to  
12 which is to be disabled, and information reasonably  
13 sufficient to permit the service provider to locate  
14 that reference or link.

15 “(e) MISREPRESENTATIONS.—Any person who know-  
16 ingly materially misrepresents under this section—

17 “(1) that material or activity is infringing, or

18 “(2) that material or activity was removed or  
19 disabled by mistake or misidentification,

20 shall be liable for any damages, including costs and attor-  
21 neys’ fees, incurred by the alleged infringer, by any copy-  
22 right owner or copyright owner’s authorized licensee, or  
23 by a service provider, who is injured by such misrepresen-  
24 tation, as the result of the service provider relying upon  
25 such misrepresentation in removing or disabling access to

1 the material or activity claimed to be infringing, or in re-  
2 placing the removed material or ceasing to disable access  
3 to it.

4 “(f) REPLACEMENT OF REMOVED OR DISABLED MA-  
5 TERIAL AND LIMITATION ON OTHER LIABILITY.—

6 “(1) NO LIABILITY FOR TAKING DOWN GEN-  
7 ERALLY.—Subject to paragraph (2), a service pro-  
8 vider shall not be liable to any person for any claim  
9 based on the service provider’s good faith disabling  
10 of access to, or removal of, material or activity  
11 claimed to be infringing or based on facts or cir-  
12 cumstances from which infringing activity is appar-  
13 ent, regardless of whether the material or activity is  
14 ultimately determined to be infringing.

15 “(2) EXCEPTION.—Paragraph (1) 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  
20 is disabled by the service provider, pursuant to a no-  
21 tice provided under subsection (c)(1)(C), unless the  
22 service provider—

23 “(A) takes reasonable steps promptly to  
24 notify the subscriber that it has removed or dis-  
25 abled access to the material;

1           “(B) upon receipt of a counter notification  
2 described in paragraph (3), promptly provides  
3 the person who provided the notification under  
4 subsection (c)(1)(C) with a copy of the counter  
5 notification, and informs that person that it will  
6 replace the removed material or cease disabling  
7 access to it in 10 business days; and

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

19           “(3) CONTENTS OF COUNTER NOTIFICATION.—

20 To be effective under this subsection, a counter noti-  
21 fication must be a written communication provided  
22 to the service provider’s designated agent that in-  
23 cludes substantially the following:

24           “(A) A physical or electronic signature of  
25 the subscriber.

1           “(B) Identification of the material that has  
2           been removed or to which access has been dis-  
3           abled and the location at which the material ap-  
4           peared before it was removed or access to it was  
5           disabled.

6           “(C) A statement under penalty of perjury  
7           that the subscriber has a good faith belief that  
8           the material was removed or disabled as a re-  
9           sult of mistake or misidentification of the mate-  
10          rial to be removed or disabled.

11          “(D) The subscriber’s name, address, and  
12          telephone number, and a statement that the  
13          subscriber consents to the jurisdiction of Fed-  
14          eral District Court for the judicial district in  
15          which the address is located, or if the subscrib-  
16          er’s address is outside of the United States, for  
17          any judicial district in which the service pro-  
18          vider may be found, and that the subscriber will  
19          accept service of process from the person who  
20          provided notification under subsection (c)(1)(C)  
21          or an agent of such person.

22          “(4) LIMITATION ON OTHER LIABILITY.—A  
23          service provider’s compliance with paragraph (2)  
24          shall not subject the service provider to liability for  
25          copyright infringement with respect to the material

1 identified in the notice provided under subsection  
2 (c)(1)(C).

3 “(g) SUBPOENA TO IDENTIFY INFRINGER.—

4 “(1) REQUEST.—A copyright owner or a person  
5 authorized to act on the owner’s behalf may request  
6 the clerk of any United States district court to issue  
7 a subpoena to a service provider for identification of  
8 an alleged infringer in accordance with this sub-  
9 section.

10 “(2) CONTENTS OF REQUEST.—The request  
11 may be made by filing with the clerk—

12 “(A) a copy of a notification described in  
13 subsection (c)(4)(A);

14 “(B) a proposed subpoena; and

15 “(C) a sworn declaration to the effect that  
16 the purpose for which the subpoena is sought is  
17 to obtain the identity of an alleged infringer  
18 and that such information will only be used for  
19 the purpose of protecting rights under this title.

20 “(3) CONTENTS OF SUBPOENA.—The subpoena  
21 shall authorize and order the service provider receiv-  
22 ing the notification and the subpoena to expedi-  
23 tiously disclose to the copyright owner or person au-  
24 thorized by the copyright owner information suffi-  
25 cient to identify the alleged infringer of the material

1 described in the notification to the extent such infor-  
2 mation is available to the service provider.

3 “(4) BASIS FOR GRANTING SUBPOENA.—If the  
4 notification filed satisfies the provisions of sub-  
5 section (c)(4)(A), the proposed subpoena is in proper  
6 form, and the accompanying declaration is properly  
7 executed, the clerk shall expeditiously issue and sign  
8 the proposed subpoena and return it to the requester  
9 for delivery to the service provider.

10 “(5) ACTIONS OF SERVICE PROVIDER RECEIV-  
11 ING SUBPOENA.—Upon receipt of the issued sub-  
12 poena, either accompanying or subsequent to the re-  
13 ceipt of a notification described in subsection  
14 (c)(4)(A), the service provider shall expeditiously  
15 disclose to the copyright owner or person authorized  
16 by the copyright owner the information required by  
17 the subpoena, notwithstanding any other provision of  
18 law and regardless of whether the service provider  
19 responds to the notification.

20 “(6) RULES APPLICABLE TO SUBPOENA.—Un-  
21 less otherwise provided by this section or by applica-  
22 ble rules of the court, the procedure for issuance and  
23 delivery of the subpoena, and the remedies for non-  
24 compliance with the subpoena, shall be governed to  
25 the greatest extent practicable by those provisions of

1 the Federal Rules of Civil Procedure governing the  
2 issuance, service, and enforcement of a subpoena  
3 duces tecum.

4 “(h) CONDITIONS FOR ELIGIBILITY.—

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

9 “(A) has adopted and reasonably imple-  
10 mented, and informs subscribers and account  
11 holders of the service provider’s system or net-  
12 work of, a policy that provides for the termi-  
13 nation in appropriate circumstances of subscrib-  
14 ers and account holders of the service provider’s  
15 system or network who are repeat infringers;  
16 and

17 “(B) accommodates and does not interfere  
18 with standard technical measures.

19 “(2) DEFINITION.—As used in this subsection,  
20 the term ‘standard technical measures’ means tech-  
21 nical measures that are used by copyright owners to  
22 identify or protect copyrighted works and—

23 “(A) have been developed pursuant to a  
24 broad consensus of copyright owners and serv-



1 ice providers in an open, fair, voluntary, multi-  
2 industry standards process;

3 “(B) are available to any person on rea-  
4 sonable and nondiscriminatory terms; and

5 “(C) do not impose substantial costs on  
6 service providers or substantial burdens on their  
7 systems or networks.

8 “(i) INJUNCTIONS.—The following rules shall apply  
9 in the case of any application for an injunction under sec-  
10 tion 502 against a service provider that is not subject to  
11 monetary remedies under this section:

12 “(1) SCOPE OF RELIEF.—(A) With respect to  
13 conduct other than that which qualifies for the limi-  
14 tation on remedies set forth in subsection (a), the  
15 court may grant injunctive relief with respect to a  
16 service provider only in one or more of the following  
17 forms:

18 “(i) An order restraining the service pro-  
19 vider from providing access to infringing mate-  
20 rial or activity residing at a particular online  
21 site on the provider’s system or network.

22 “(ii) An order restraining the service pro-  
23 vider from providing access to a subscriber or  
24 account holder of the service provider’s system  
25 or network who is engaging in infringing activ-

1           ity and is identified in the order, by terminating  
2           the accounts of the subscriber or account holder  
3           that are specified in the order.

4           “(iii) Such other injunctive relief as the  
5           court may consider necessary to prevent or re-  
6           strain infringement of copyrighted material  
7           specified in the order of the court at a particu-  
8           lar online location, if such relief is the least  
9           burdensome to the service provider among the  
10          forms of relief comparably effective for that  
11          purpose.

12          “(B) If the service provider qualifies for the  
13          limitation on remedies described in subsection (a),  
14          the court may only grant injunctive relief in one or  
15          both of the following forms:

16                 “(i) An order restraining the service pro-  
17                 vider from providing access to a subscriber or  
18                 account holder of the service provider’s system  
19                 or network who is using the provider’s service  
20                 to engage in infringing activity and is identified  
21                 in the order, by terminating the accounts of the  
22                 subscriber or account holder that are specified  
23                 in the order.

24                 “(ii) An order restraining the service pro-  
25                 vider from providing access, by taking reason-

1           able steps specified in the order to block access,  
2           to a specific, identified, online location outside  
3           the United States.

4           “(2) CONSIDERATIONS.—The court, in consid-  
5           ering the relevant criteria for injunctive relief under  
6           applicable law, shall consider—

7                   “(A) whether such an injunction, either  
8                   alone or in combination with other such injunc-  
9                   tions issued against the same service provider  
10                  under this subsection, would significantly bur-  
11                  den either the provider or the operation of the  
12                  provider’s system or network;

13                  “(B) the magnitude of the harm likely to  
14                  be suffered by the copyright owner in the digi-  
15                  tal network environment if steps are not taken  
16                  to prevent or restrain the infringement;

17                  “(C) whether implementation of such an  
18                  injunction would be technically feasible and ef-  
19                  fective, and would not interfere with access to  
20                  noninfringing material at other online locations;  
21                  and

22                  “(D) whether other less burdensome and  
23                  comparably effective means of preventing or re-  
24                  straining access to the infringing material are  
25                  available.

1           “(3) NOTICE AND EX PARTE ORDERS.—In-  
2           junctive relief under this subsection shall be avail-  
3           able only after notice to the service provider and an  
4           opportunity for the service provider to appear are  
5           provided, except for orders ensuring the preservation  
6           of evidence or other orders having no material ad-  
7           verse effect on the operation of the service provider’s  
8           communications network.

9           “(j) DEFINITIONS.—

10           “(1) SERVICE PROVIDER.—(A) As used in sub-  
11           section (a), the term ‘service provider’ means an en-  
12           tity offering the transmission, routing, or providing  
13           of connections for digital online communications, be-  
14           tween or among points specified by a user, of mate-  
15           rial of the user’s choosing, without modification to  
16           the content of the material as sent or received.

17           “(B) As used in this section, other than sub-  
18           section (a), the term ‘service provider’ means a pro-  
19           vider of online services or network access, or the op-  
20           erator of facilities therefor, and includes an entity  
21           described in subparagraph (A).

22           “(2) MONETARY RELIEF.—As used in this sec-  
23           tion, the term ‘monetary relief’ means damages,  
24           costs, attorneys’ fees, and any other form of mone-  
25           tary payment.

1       “(k) OTHER DEFENSES NOT AFFECTED.—The fail-  
2 ure of a service provider’s conduct to qualify for limitation  
3 of liability under this section shall not bear adversely upon  
4 the consideration of a defense by the service provider that  
5 the service provider’s conduct is not infringing under this  
6 title or any other defense.

7       “(l) PROTECTION OF PRIVACY.—Nothing in this sec-  
8 tion shall be construed to condition the applicability of  
9 subsections (a) through (d) on—

10           “(1) a service provider monitoring its service or  
11 affirmatively seeking facts indicating infringing ac-  
12 tivity, except to the extent consistent with a stand-  
13 ard technical measure complying with the provisions  
14 of subsection (h); or

15           “(2) a service provider gaining access to, re-  
16 moving, or disabling access to material in cases in  
17 which such conduct is prohibited by law.

18       “(m) CONSTRUCTION.—Subsections (a), (b), (c), and  
19 (d) describe separate and distinct functions for purposes  
20 of applying this section. Whether a service provider quali-  
21 fies for the limitation on liability in any one of those sub-  
22 sections shall be based solely on the criteria in that sub-  
23 section, and shall not affect a determination of whether  
24 that service provider qualifies for the limitations on liabil-  
25 ity under any other such subsection.”.

1 (b) CONFORMING AMENDMENT.—The table of sec-  
2 tions for chapter 5 of title 17, United States Code, is  
3 amended by adding at the end the following:

“512. Limitations on liability relating to material online.”.

4 (c) EFFECTIVE DATE.—The amendments made by  
5 this section take effect on the date of the enactment of  
6 this Act.

7 **SEC. 203. EFFECTIVE DATE.**

8 This title and the amendments made by this title  
9 shall take effect on the date of the enactment of this Act.

10 **TITLE III-COMPUTER MAINTENANCE OR REPAIR COPY-**  
11 **RIGHT EXEMPTION**

13 **SEC. 301. SHORT TITLE.**

14 This title may be cited as the “Computer Maintenance Competition Assurance Act”.

16 **SEC. 302. LIMITATIONS ON EXCLUSIVE RIGHTS; COMPUTER**  
17 **PROGRAMS.**

18 Section 117 of title 17, United States Code, is  
19 amended—

20 (1) by striking “Notwithstanding” and inserting the  
21 following:

22 “(a) MAKING OF ADDITIONAL COPY OR ADAPTATION  
23 BY OWNER OF COPY.—Notwithstanding”;

24 (2) by striking “Any exact” and inserting the follow-  
25 ing:

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

3       (3) by adding at the end the following:

4       “(c) MACHINE MAINTENANCE OR REPAIR.—Notwith-  
5 standing the provisions of section 106, it is not an in-  
6 fringement for the owner or lessee of a machine to make  
7 or authorize the making of a copy of a computer program  
8 if such copy is made solely by virtue of the activation of  
9 a machine that lawfully contains an authorized copy of  
10 the computer program, for purposes only of maintenance  
11 or repair of that machine, if—

12               “(1) such new copy is used in no other manner  
13       and is destroyed immediately after the maintenance  
14       or repair is completed; and

15               “(2) with respect to any computer program or  
16       part thereof that is not necessary for that machine  
17       to be activated, such program or part thereof is not  
18       accessed or used other than to make such new copy  
19       by virtue of the activation of the machine.

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

21               “(1) the ‘maintenance’ of a machine is the serv-  
22       icing of the machine in order to make it work in ac-  
23       cordance with its original specifications and any  
24       changes to those specifications authorized for that  
25       machine; and

1           “(2) the ‘repair’ of a machine is the restoring  
2           of the machine to the state of working in accordance  
3           with its original specifications and any changes to  
4           those specifications authorized for that machine.”.

5           **TITLE IV—MISCELLANEOUS**  
6           **PROVISIONS**

7           **Subtitle A—Establishment of the**  
8           **Under Secretary of Commerce**  
9           **for Intellectual Property Policy**

10          **SEC. 401. UNDER SECRETARY OF COMMERCE FOR INTEL-**  
11                                   **LECTUAL PROPERTY POLICY.**

12           (a) APPOINTMENT.—There shall be within the De-  
13           partment of Commerce an Under Secretary of Commerce  
14           for Intellectual Property Policy, who shall be appointed  
15           by the President, by and with the advice and consent of  
16           the Senate, at level II of the Executive Schedule. On or  
17           after the effective date of this subtitle, the President may  
18           designate an individual to serve as the Acting Under Sec-  
19           retary until the date on which an Under Secretary quali-  
20           fies under this subsection.

21           (b) DUTIES.—The Under Secretary of Commerce for  
22           Intellectual Property Policy, under the direction of the  
23           Secretary of Commerce, shall perform the following func-  
24           tions with respect to intellectual property policy:



1           (1) In coordination with the Under Secretary of  
2 Commerce for International Trade, promote exports  
3 of goods and services of the United States industries  
4 that rely on intellectual property.

5           (2) Advise the President, through the Secretary  
6 of Commerce, on national and certain international  
7 issues relating to intellectual property policy, includ-  
8 ing issues in the areas of patents, trademarks, and  
9 copyrights.

10          (3) Advise Federal departments and agencies  
11 on matters of intellectual property protection in  
12 other countries.

13          (4) Provide guidance, as appropriate, with re-  
14 spect to proposals by agencies to assist foreign gov-  
15 ernments and international intergovernmental orga-  
16 nizations on matters of intellectual property protec-  
17 tion.

18          (5) Conduct programs and studies related to  
19 the effectiveness of intellectual property protection  
20 throughout the world.

21          (6) Advise the Secretary of Commerce on pro-  
22 grams and studies relating to intellectual property  
23 policy that are conducted, or authorized to be con-  
24 ducted, cooperatively with foreign patent and trade-

1 mark offices and international intergovernmental or-  
2 ganizations.

3 (7) In coordination with the Department of  
4 State, conduct programs and studies cooperatively  
5 with foreign intellectual property offices and inter-  
6 national intergovernmental organizations.

7 (c) DEPUTY UNDER SECRETARIES.—To assist the  
8 Under Secretary of Commerce for Intellectual Property  
9 Policy, the Under Secretary shall appoint a Deputy Under  
10 Secretary for Patent Policy and a Deputy Under Secretary  
11 for Trademark Policy, as members of the Senior Executive  
12 Service in accordance with the provisions of title 5, United  
13 States Code. The Deputy Under Secretaries shall perform  
14 such duties and functions as the Under Secretary shall  
15 prescribe.

16 (d) COMPENSATION.—Section 5313 of title 5, United  
17 States Code, is amended by adding at the end the follow-  
18 ing: “Under Secretary of Commerce for Intellectual Prop-  
19 erty Policy.”

20 (e) FUNDING.—Funds available to the Patent and  
21 Trademark Office shall be made available for all expenses  
22 of the Office of the Under Secretary of Commerce for In-  
23 tellectual Property Policy, subject to prior approval in ap-  
24 propriations Acts. Amounts made available under this sub-  
25 section shall not exceed 2 percent of the projected annual

1 revenues of the Patent and Trademark Office from fees  
2 for services and goods of that Office. The Secretary of  
3 Commerce shall determine the budget requirements of the  
4 Office of the Under Secretary for Intellectual Property  
5 Policy.

6 (f) CONSULTATION.—In connection with the perform-  
7 ance of his or her duties under this section, the Under  
8 Secretary shall, on appropriate matters, consult with the  
9 Register of Copyrights.

10 **SEC. 402. RELATIONSHIP WITH EXISTING AUTHORITIES.**

11 (a) NO DEROGATION.—Nothing in section 401 shall  
12 derogate from the duties of the United States Trade Rep-  
13 resentative or from the duties of the Secretary of State.  
14 In addition, nothing in this subtitle shall derogate from  
15 the duties and functions of the Register of Copyrights or  
16 otherwise alter current authorities relating to copyright  
17 matters.

18 (b) CLARIFICATION OF AUTHORITY OF THE COPY-  
19 RIGHT OFFICE.—Section 701 of title 17, United States  
20 Code, is amended—

21 (1) by redesignating subsections (b) through (e)  
22 as subsections (c) through (f), respectively; and

23 (2) by inserting after subsection (a) the follow-  
24 ing:

1       “(b) In addition to the functions and duties set out  
2 elsewhere in this chapter, the Register of Copyrights shall  
3 perform the following functions:

4           “(1) Advise Congress on national and inter-  
5 national issues relating to copyright, other matters  
6 arising under chapters 9, 12, 13, and 14 of this  
7 title, and related matters.

8           “(2) Provide information and assistance to Fed-  
9 eral departments and agencies and the Judiciary on  
10 national and international issues relating to copy-  
11 right, other matters arising under chapters 9, 12,  
12 13, and 14 of this title, and related matters.

13           “(3) Participate in meetings of international  
14 intergovernmental organizations and meetings with  
15 foreign government officials relating to copyright,  
16 other matters arising under chapters 9, 12, 13, and  
17 14 of this title, and related matters, including as a  
18 member of United States delegations as authorized  
19 by the appropriate Executive Branch authority.

20           “(4) Conduct studies and programs regarding  
21 copyright, other matters arising under chapters 9,  
22 12, 13, and 14 of this title, and related matters, the  
23 administration of the Copyright Office, or any func-  
24 tion vested in the Copyright Office by law, including  
25 educational programs conducted cooperatively with

1 foreign intellectual property offices and international  
2 intergovernmental organizations.

3 “(5) Perform such other functions as Congress  
4 may direct, or as may be appropriate in furtherance  
5 of the functions and duties specifically set forth in  
6 this title.”

## 7 **Subtitle B—Related Provisions**

### 8 **SEC. 411. EPHEMERAL RECORDINGS.**

9 Section 112(a) of title 17, United States Code, is  
10 amended—

11 (1) by redesignating paragraphs (1), (2), and  
12 (3) as subparagraphs (A), (B), and (C), respectively;

13 (2) by inserting “(1)” after “(a)”; and

14 (3) by inserting after “114(a),” the following:

15 “or for a transmitting organization that is a broad-  
16 cast radio or television station licensed as such by  
17 the Federal Communications Commission that  
18 broadcasts a performance of a sound recording in a  
19 digital format on a nonsubscription basis,”; and

20 (4) by adding at the end the following:

21 “(2) In a case in which a transmitting organization  
22 entitled to make a copy or phonorecord under paragraph  
23 (1) in connection with the transmission to the public of  
24 a performance or display of a work is prevented from mak-  
25 ing such copy or phonorecord by reason of the application

1 by the copyright owner of technical measures that prevent  
2 the reproduction of the work, the copyright owner shall  
3 make available to the transmitting organization the nec-  
4 essary means for permitting the making of such copy or  
5 phonorecord as permitted under that paragraph, if it is  
6 technologically feasible and economically reasonable for  
7 the copyright owner to do so. If the copyright owner fails  
8 to do so in a timely manner in light of the transmitting  
9 organization's reasonable business requirements, the  
10 transmitting organization shall not be liable for a violation  
11 of section 1201(a)(1) of this title for engaging in such ac-  
12 tivities as are necessary to make such copies or  
13 phonorecords as permitted under paragraph (1) of this  
14 subsection.”.

15 **SEC. 412. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE**  
16 **EDUCATION.**

17 (a) RECOMMENDATIONS BY REGISTER OF COPY-  
18 RIGHTS.—Not later than 6 months after the date of the  
19 enactment of this Act, the Register of Copyrights, after  
20 consultation with representatives of copyright owners,  
21 nonprofit educational institutions, and nonprofit libraries  
22 and archives, shall submit to the Congress recommenda-  
23 tions on how to promote distance education through digi-  
24 tal technologies, including interactive digital networks,  
25 while maintaining an appropriate balance between the

1 rights of copyright owners and the needs of users of copy-  
2 righted works. Such recommendations shall include any  
3 legislation the Register of Copyrights considers appro-  
4 priate to achieve the objective described in the preceding  
5 sentence.

6 (b) FACTORS.—In formulating recommendations  
7 under subsection (a), the Register of Copyrights shall con-  
8 sider—

9 (1) the need for an exemption from exclusive  
10 rights of copyright owners for distance education  
11 through digital networks;

12 (2) the categories of works to be included under  
13 any distance education exemption;

14 (3) the extent of appropriate quantitative limi-  
15 tations on the portions of works that may be used  
16 under any distance education exemption;

17 (4) the parties who should be entitled to the  
18 benefits of any distance education exemption;

19 (5) the parties who should be designated as eli-  
20 gible recipients of distance education materials  
21 under any distance education exemption;

22 (6) whether and what types of technological  
23 measures can or should be employed to safeguard  
24 against unauthorized access to, and use or retention  
25 of, copyrighted materials as a condition of eligibility

1 for any distance education exemption, including, in  
2 light of developing technological capabilities, the ex-  
3 emption set out in section 110(2) of title 17, United  
4 States Code;

5 (7) the extent to which the availability of li-  
6 censes for the use of copyrighted works in distance  
7 education through interactive digital networks  
8 should be considered in assessing eligibility for any  
9 distance education exemption; and

10 (8) such other issues relating to distance edu-  
11 cation through interactive digital networks that the  
12 Register considers appropriate.

13 **SEC. 413. EXEMPTION FOR LIBRARIES AND ARCHIVES.**

14 Section 108 of title 17, United States Code, is  
15 amended—

16 (1) in subsection (a)—

17 (A) by striking “Notwithstanding” and in-  
18 sserting “Except as otherwise provided in this  
19 title and notwithstanding”;

20 (B) by inserting after “no more than one  
21 copy or phonorecord of a work” the following:  
22 “, except as provided in subsections (b) and  
23 (c)”;

24 (C) in paragraph (3) by inserting after  
25 “copyright” the following: “that appears on the



1 copy or phonorecord that is reproduced under  
2 the provisions of this section, or includes a leg-  
3 end stating that the work may be protected by  
4 copyright if no such notice can be found on the  
5 copy or phonorecord that is reproduced under  
6 the provisions of this section”;

7 (2) in subsection (b)—

8 (A) by striking “a copy or phonorecord”  
9 and inserting “three copies or phonorecords”;

10 (B) by striking “in facsimile form”; and

11 (C) by striking “if the copy or phonorecord  
12 reproduced is currently in the collections of the  
13 library or archives.” and inserting “if—

14 “(1) the copy or phonorecord reproduced is cur-  
15 rently in the collections of the library or archives;  
16 and

17 “(2) any such copy or phonorecord that is re-  
18 produced in digital format is not otherwise distrib-  
19 uted in that format and is not made available to the  
20 public in that format outside the premises of the li-  
21 brary or archives.”; and

22 (3) in subsection (c)—

23 (A) by striking “a copy or phonorecord”  
24 and inserting “three copies or phonorecords”;

25 (B) by striking “in facsimile form”;

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

4 (D) by striking “if the library or archives  
5 has, after a reasonable effort, determined that  
6 an unused replacement cannot be obtained at a  
7 fair price.” and inserting “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 re-  
12 produced in digital format is not made available to  
13 the public in that format outside the premises of the  
14 library or archives in lawful possession of such  
15 copy.”; and

16 (E) by adding at the end the following:  
17 “For purposes of this subsection, a format shall be consid-  
18 ered obsolete if the machine or device necessary to render  
19 perceptible a work stored in that format is no longer man-  
20 ufactured or is no longer reasonably available in the com-  
21 mercial marketplace.”.

22 **SEC. 414. FAIR USE.**

23 Section 107 of title 17, United States Code, is  
24 amended in the first sentence by striking “, including such  
25 use” and all that follows through “section.”.

1 **SEC. 415. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RE-**  
2 **CORDINGS; EPHEMERAL RECORDINGS.**

3 (a) SCOPE OF EXCLUSIVE RIGHTS IN SOUND RE-  
4 CORDINGS.—Section 114 of title 17, United States Code,  
5 is amended as follows:

6 (1) Subsection (d) is amended—

7 (A) by striking subparagraph (A) and in-  
8 serting the following:

9 “(A) a nonsubscription broadcast trans-  
10 mission;”; and

11 (B) by amending paragraph (2) to read as  
12 follows:

13 “(2) STATUTORY LICENSING OF CERTAIN  
14 TRANSMISSIONS.—The performance of a sound re-  
15 cording publicly by means of a subscription digital  
16 audio transmission not exempt under paragraph (1)  
17 or an eligible nonsubscription digital audio trans-  
18 mission shall be subject to statutory licensing, in ac-  
19 cordance with subsection (f) if—

20 “(A) in the case of a subscription trans-  
21 mission not exempt under paragraph (1) or an  
22 eligible nonsubscription transmission—

23 “(i) the transmission is not part of an  
24 interactive service;

25 “(ii) except in the case of a trans-  
26 mission to a business establishment, the

1 transmitting entity does not automatically  
2 and intentionally cause any device receiv-  
3 ing the transmission to switch from one  
4 program channel to another; and

5 “(iii) except as provided in section  
6 1002(e), the transmission of the sound re-  
7 cording is accompanied by the information  
8 encoded in that sound recording, if any, by  
9 or under the authority of the copyright  
10 owner of that sound recording, that identi-  
11 fies the title of the sound recording, the  
12 featured recording artist who performs on  
13 the sound recording, and related informa-  
14 tion, including information concerning the  
15 underlying musical work and its writer;

16 “(B) in the case of a subscription trans-  
17 mission not exempt under paragraph (1) by a  
18 preexisting subscription service in the same  
19 transmission medium used by such service on  
20 July 31, 1998—

21 “(i) the transmission does not exceed  
22 the sound recording performance com-  
23 plement;

24 “(ii) the transmitting entity does not  
25 cause to be published by means of an ad-

1 vance program schedule or prior announce-  
2 ment the titles of the specific sound re-  
3 cordings or phonorecords embodying such  
4 sound recordings to be transmitted; and

5 “(C) in the case of an eligible nonsubscrip-  
6 tion transmission or a subscription transmission  
7 not exempt under paragraph (1) by a new sub-  
8 scription service or by a preexisting subscription  
9 service other than in the same transmission me-  
10 dium used by such service on July 31, 1998—

11 “(i) the transmission does not exceed  
12 the sound recording performance com-  
13 plement, except that this requirement shall  
14 not apply in the case of a retransmission  
15 of a broadcast transmission if the retrans-  
16 mission is made by a transmitting entity  
17 that does not have the right or ability to  
18 control the programming of the broadcast  
19 station making the broadcast transmission,  
20 unless the broadcast station makes broad-  
21 cast transmissions—

22 “(I) in digital format that regu-  
23 larly exceed the sound recording per-  
24 formance complement; or

1                   “(II) in analog format, a sub-  
2                   stantial portion of which, on a weekly  
3                   basis, exceed the sound recording per-  
4                   formance complement;

5                   *Provided, however,* That the sound record-  
6                   ing copyright owner or its representative  
7                   has notified the transmitting entity in writ-  
8                   ing that broadcast transmissions of the  
9                   copyright owner’s sound recordings exceed  
10                  the sound recording complement as pro-  
11                  vided in this clause;

12                  “(ii) the transmitting entity does not  
13                  cause to be published, or induce or facili-  
14                  tate the publication, by means of an ad-  
15                  vance program schedule or prior announce-  
16                  ment, the titles of the specific sound re-  
17                  cordings to be transmitted, the  
18                  phonorecords embodying such sound re-  
19                  cordings, or, other than for illustrative  
20                  purposes, the names of the featured re-  
21                  cording artists, except that this clause does  
22                  not disqualify a transmitting entity that  
23                  makes a prior announcement that a par-  
24                  ticular artist will be featured within an un-  
25                  specified future time period and, in any 1-

1 hour period, no more than 3 such an-  
2 nouncements are made with respect to no  
3 more than 2 artists in each announcement;

4 “(iii) the transmission is not part of—

5 “(I) an archived program of less  
6 than 5 hours duration;

7 “(II) an archived program of  
8 greater than 5 hours duration that is  
9 made available for a period exceeding  
10 2 weeks;

11 “(III) a continuous program  
12 which is of less than 3 hours duration;  
13 or

14 “(IV) a program, other than an  
15 archived or continuous program, that  
16 is transmitted at a scheduled time  
17 more than 3 additional times in a 2-  
18 week period following the first trans-  
19 mission of the program and for an ad-  
20 ditional 2-week period more than 1  
21 month following the end of the first  
22 such 2-week period;

23 “(iv) the transmitting entity does not  
24 knowingly perform the sound recording in  
25 a manner that is likely to cause confusion,

1 to cause mistake, or to deceive, as to the  
2 affiliation, connection, or association of the  
3 copyright owner or featured recording art-  
4 ist with the transmitting entity or a par-  
5 ticular product or service advertised by the  
6 transmitting entity, or as to the origin,  
7 sponsorship, or approval by the copyright  
8 owner or featured recording artist of the  
9 activities of the transmitting entity other  
10 than the performance of the sound record-  
11 ing itself;

12 “(v) the transmitting entity cooper-  
13 ates to prevent, to the extent feasible with-  
14 out imposing substantial costs or burdens,  
15 a transmission recipient or any other per-  
16 son or entity from automatically scanning  
17 the transmitting entity’s transmissions to-  
18 gether with transmissions by other trans-  
19 mitting entities to select a particular sound  
20 recording to be transmitted to the trans-  
21 mission recipient;

22 “(vi) the transmitting entity takes  
23 reasonable steps to ensure, to the extent  
24 within its control, that the transmission re-  
25 cipient cannot make a phonorecord in a



1 digital format of the transmission, and the  
2 transmitting entity takes no affirmative  
3 steps to cause or induce the making of a  
4 phonorecord by the transmission recipient;

5 “(vii) phonorecords of the sound re-  
6 cording have been distributed to the public  
7 in the United States under the authority of  
8 the copyright owner or the copyright owner  
9 authorizes the transmitting entity to trans-  
10 mit the sound recording, and the transmit-  
11 ting entity makes the transmission from a  
12 phonorecord lawfully made under this title;

13 “(viii) the transmitting entity accom-  
14 modates and does not interfere with the  
15 transmission of technical measures that  
16 are widely used by sound recording copy-  
17 right owners to identify or protect copy-  
18 righted works, and that are technically fea-  
19 sible of being transmitted by the transmit-  
20 ting entity without imposing substantial  
21 costs on the transmitting entity or result-  
22 ing in perceptible aural or visual degrada-  
23 tion of the digital signal; and

24 “(ix) in the case of an eligible non-  
25 subscription transmission, the transmitting

1           entity identifies the sound recording dur-  
2           ing, but not before, the time it is per-  
3           formed, including the title of the sound re-  
4           cording, the title of the phonorecord em-  
5           bodying such sound recording, if any, and  
6           the featured recording artist in a manner  
7           to permit it to be perceived by the trans-  
8           mission recipient, except that the obliga-  
9           tion in this clause shall not take effect  
10          until 1 year after the date of the enact-  
11          ment of the Digital Millennium Copyright  
12          Act.”.

13           (2) Subsection (f) is amended to read as fol-  
14          lows:

15           (A) in paragraph (1)—

16           (i) in the first sentence—

17           (I) by striking “(1) No” and in-  
18           serting “(1)(A) No”;

19           (II) by striking “the activities”  
20           and inserting “subscription trans-  
21           missions by preexisting subscription  
22           services”; and

23           (III) by striking “2000” and in-  
24           serting “2001”; and

1 (ii) by amending the third sentence to  
2 read as follows: “Any copyright owners of  
3 sound recordings or any preexisting sub-  
4 scription services may submit to the Li-  
5 brarian of Congress licenses covering such  
6 subscriptions transmissions with respect to  
7 such sound recordings.”; and

8 (B) by striking paragraphs (2), (3), (4),  
9 and (5) and inserting the following:

10 “(B) In the absence of license agreements nego-  
11 tiated under subparagraph (A), during the 60-day  
12 period commencing 6 months after publication of the  
13 notice specified in subparagraph (A), and upon the  
14 filing of a petition in accordance with section  
15 803(a)(1), the Librarian of Congress shall, pursuant  
16 to chapter 8, convene a copyright arbitration royalty  
17 panel to determine and publish in the Federal Reg-  
18 ister a schedule of rates and terms which, subject to  
19 paragraph (3), shall be binding on all copyright own-  
20 ers of sound recordings and preexisting subscription  
21 services. In establishing rates and terms for pre-  
22 existing subscription services, in addition to the ob-  
23 jectives set forth in section 801(b)(1), the copyright  
24 arbitration royalty panel may consider the rates and  
25 terms for comparable types of subscription digital

1 audio transmission services and comparable cir-  
2 cumstances under voluntary license agreements ne-  
3 gotiated as provided in subparagraph (A).

4 “(C)(i) Publication of a notice of the initiation  
5 of voluntary negotiation proceedings as specified in  
6 subparagraph (A) shall be repeated, in accordance  
7 with regulations that the Librarian of Congress shall  
8 prescribe—

9 “(I) no later than 30 days after a petition  
10 is filed by any copyright owners of sound re-  
11 cordings or any preexisting subscription services  
12 indicating that a new type of subscription digi-  
13 tal audio transmission service on which sound  
14 recordings are performed is or is about to be-  
15 come operational; and

16 “(II) in the first week of January, 2001,  
17 and at 5-year intervals thereafter.

18 “(ii) The procedures specified in subparagraph  
19 (B) shall be repeated, in accordance with regulations  
20 that the Librarian of Congress shall prescribe, upon  
21 filing of a petition in accordance with section  
22 803(a)(1) during a 60-day period commencing—

23 “(I) 6 months after publication of a notice  
24 of the initiation of voluntary negotiation pro-  
25 ceedings under subparagraph (A) pursuant to a

1           petition under clause (i)(I) of this subpara-  
2           graph; or

3                   “(II) on July 1, 2001, and at 5-year inter-  
4           vals thereafter.

5                   “(iii) The procedures specified in subparagraph  
6           (B) shall be concluded in accordance with section  
7           802.

8                   “(2)(A) No later than 30 days after the date of  
9           the enactment of the Digital Millennium Copyright  
10          Act, the Librarian of Congress shall cause notice to  
11          be published in the Federal Register of the initiation  
12          of voluntary negotiation proceedings for the purpose  
13          of determining reasonable terms and rates of royalty  
14          payments for eligible nonsubscription transmissions  
15          and transmissions by new subscription services spec-  
16          ified by subsection (d)(2) during the period begin-  
17          ning on the date of the enactment of such Act and  
18          ending on December 31, 2000, or such other date as  
19          the parties may agree. Such rates and terms shall  
20          distinguish among the different types of eligible non-  
21          subscription transmission services then in operation  
22          and shall include a minimum fee for each such type  
23          of service. Any copyright owners of sound recordings  
24          or any entities performing sound recordings affected  
25          by this section may submit to the Librarian of Con-

1       gress licenses covering such eligible nonsubscription  
2       transmissions with respect to such sound recordings.  
3       The parties to each negotiation proceeding shall bear  
4       their own costs.

5               “(B) In the absence of license agreements nego-  
6       tiated under subparagraph (A), during the 60-day  
7       period commencing 6 months after publication of the  
8       notice specified in subparagraph (A), and upon the  
9       filing of a petition in accordance with section  
10      803(a)(1), the Librarian of Congress shall, pursuant  
11      to chapter 8, convene a copyright arbitration royalty  
12      panel to determine and publish in the Federal Reg-  
13      ister a schedule of rates and terms which, subject to  
14      paragraph (3), shall be binding on all copyright own-  
15      ers of sound recordings and entities performing  
16      sound recordings during the period beginning on the  
17      date of the enactment of the Digital Millennium  
18      Copyright Act and ending on December 31, 2000, or  
19      such other date as the parties may agree. Such rates  
20      and terms shall distinguish among the different  
21      types of eligible nonsubscription, transmission serv-  
22      ices then in operation and shall include a minimum  
23      fee for each such type of service, such differences to  
24      be based on criteria, including, but not limited to,  
25      the quantity and nature of the use of sound record-

1       ings and the degree to which use of the service may  
2       substitute for or may promote the purchase of  
3       phonorecords by consumers. In establishing rates  
4       and terms for transmissions by eligible nonsubscrip-  
5       tion services and new subscription services, the copy-  
6       right arbitration royalty panel shall establish rates  
7       and terms that most clearly represent the rates and  
8       terms that would have been negotiated in the mar-  
9       ketplace between a willing buyer and a willing seller.  
10      In determining such rates and terms, the copyright  
11      arbitration royalty panel shall base its decision on  
12      economic, competitive and programming information  
13      presented by the parties, including—

14               “(i) whether use of the service may sub-  
15               stitute for or may promote the sales of  
16               phonorecords or otherwise may interfere with or  
17               may enhance the sound recording copyright  
18               owner’s other streams of revenue from its  
19               sound recordings; and

20               “(ii) the relative roles of the copyright  
21               owner and the copyright user in the copyrighted  
22               work and the service made available to the pub-  
23               lic with respect to relative creative contribution,  
24               technological contribution, capital investment,  
25               cost, and risk.

1           “(C)(i) Publication of a notice of the initiation  
2 of voluntary negotiation proceedings as specified in  
3 subparagraph (A) shall be repeated in accordance  
4 with regulations that the Librarian of Congress shall  
5 prescribe—

6           “(I) no later than 30 days after a petition  
7 if filed by any copyright owners of sound re-  
8 cordings or any eligible nonsubscription service  
9 or new subscription service indicating that a  
10 new type of eligible nonsubscription service or  
11 new subscription service on which sound record-  
12 ings are performed is or is about to become  
13 operational; and

14           “(II) in the first week of January 2000,  
15 and at 2-year intervals thereafter, except to the  
16 extent that different years for the repeating of  
17 such proceedings may be determined in accord-  
18 ance with subparagraph (A).

19           “(ii) The procedures specified in subparagraph  
20 (B) shall be repeated, in accordance with regulations  
21 that the Librarian of Congress shall prescribe, upon  
22 filing of a petition in accordance with section  
23 803(a)(1) during a 60-day period commencing—

24           “(I) 6 months after publication of a notice  
25 of the initiation of voluntary negotiation pro-



1           ceedings under subparagraph (A) pursuant to a  
2           petition under clause (i)(I); or

3           “(II) on July 1, 2000, and at 2-year inter-  
4           vals thereafter, except to the extent that dif-  
5           ferent years for the repeating of such proceed-  
6           ings may be determined in accordance with sub-  
7           paragraph (A).

8           “(iii) The procedures specified in subparagraph  
9           (B) shall be concluded in accordance with section  
10          802.

11          “(3) License agreements voluntarily negotiated  
12          at any time between 1 or more copyright owners of  
13          sound recordings and 1 or more entities performing  
14          sound recordings shall be given effect in lieu of any  
15          determination by a copyright arbitration royalty  
16          panel or decision by the Librarian of Congress.

17          “(4)(A) The Librarian of Congress shall also  
18          establish requirements by which copyright owners  
19          may receive reasonable notice of the use of their  
20          sound recordings under this section, and under  
21          which records of such use shall be kept and made  
22          available by entities performing sound recordings.

23          “(B) Any person who wishes to perform a  
24          sound recording publicly by means of a transmission  
25          eligible for statutory licensing under this subsection

1 may do so without infringing the exclusive right of  
2 the copyright owner of the sound recording—

3 “(i) by complying with such notice require-  
4 ments as the Librarian of Congress shall pre-  
5 scribe by regulation and by paying royalty fees  
6 in accordance with this subsection; or

7 “(ii) if such royalty fees have not been set,  
8 by agreeing to pay such royalty fees as shall be  
9 determined in accordance with this subsection.

10 “(C) Any royalty payments in arrears shall be  
11 made on or before the twentieth day of the month  
12 next succeeding the month in which the royalty fees  
13 are set.”.

14 (3) Subsection (g) is amended—

15 (A) in the subsection heading by striking  
16 “SUBSCRIPTION”;

17 (B) in paragraph (1) in the matter preced-  
18 ing subparagraph (A), by striking “subscription  
19 transmission licensed” and inserting “trans-  
20 mission licensed under a statutory license”;

21 (C) in subparagraphs (A) and (B) by strik-  
22 ing “subscription”; and

23 (D) in paragraph (2) by striking “sub-  
24 scription”.

25 (4) Subsection (j) is amended—

1 (A) by redesignating paragraphs (2), (3),  
2 (5), (6), (7), and (8) as paragraphs (3), (5),  
3 (9), (11), (12), and (13), respectively;

4 (B) by inserting after paragraph (1) the  
5 following:

6 “(2) An ‘archived program’ is a prerecorded  
7 program that is available repeatedly on demand and  
8 that is performed in the same predetermined order  
9 from the beginning.”;

10 (C) by inserting after paragraph (3), as so  
11 redesignated, the following:

12 “(4) A ‘continuous program’ is a prerecorded  
13 program that is continuously performed in the same  
14 predetermined order and the point in the program at  
15 which it is accessed is beyond the control of the  
16 transmission recipient.”;

17 (D) by inserting after paragraph (5), as so  
18 redesignated, the following:

19 “(6) An ‘eligible nonsubscription transmission’  
20 is a noninteractive, nonsubscription transmission  
21 made as part of a service that provides audio pro-  
22 gramming consisting, in whole or in part, of per-  
23 formances of sound recordings, including retrans-  
24 missions of broadcast transmissions, if the primary  
25 purpose of the service is to provide to the public

1 such audio or other entertainment programming,  
2 and the primary purpose of the service is not to sell,  
3 advertise, or promote particular products or services  
4 other than sound recordings, live concerts, or other  
5 music-related events.

6 “(7) An ‘interactive service’ is one that enables  
7 a member of the public to receive a transmission of  
8 a program specially created for the recipient, or on  
9 request, a transmission of a particular sound record-  
10 ing, whether or not as part of a program, which is  
11 selected by or on behalf of the recipient. The ability  
12 of individuals to request that particular sound re-  
13 cordings be performed for reception by the public at  
14 large does not make a service interactive, if the pro-  
15 gramming on each channel of the service does not  
16 substantially consist of sound recordings that are  
17 performed within 1 hour of the request or at a time  
18 designated by either the transmitting entity or the  
19 individual making such request. If an entity offers  
20 both interactive and noninteractive services (either  
21 concurrently or at different times), the noninter-  
22 active component shall not be treated as part of an  
23 interactive service.

24 “(8) A ‘new subscription service’ is a service  
25 that performs sound recordings by means of sub-

1       scription digital audio transmissions and that is not  
2       a preexisting subscription service.”;

3               (E) by inserting after paragraph (9), as so  
4       redesignated, the following:

5               “(10) A ‘preexisting subscription service’ is a  
6       service that performs sound recordings by means of  
7       noninteractive audio-only subscription digital audio  
8       transmissions, which was in existence and was mak-  
9       ing such transmission to the public for a fee on or  
10      before July 31, 1998.”; and

11              (F) by adding at the end the following:

12              “(14) A ‘transmission’ is either an initial trans-  
13      mission or a retransmission.”.

14      (b) EPHEMERAL RECORDINGS.—Section 112 of title  
15      17, United States Code, is amended by adding at the end  
16      the following:

17              “(f) STATUTORY LICENSE.—(1) An ephemeral re-  
18      cording of a sound recording by a transmitting organiza-  
19      tion entitled to transmit to the public a performance of  
20      that sound recording by means of a digital audio trans-  
21      mission under a statutory license in accordance with sec-  
22      tion 114(f) or an exemption provided in section  
23      114(d)(1)(B) or (C) is subject to statutory licensing under  
24      the conditions specified by this subsection.

1       “(2) A statutory license under this subsection grants  
2 a transmitting organization entitled to transmit to the  
3 public a performance of a sound recording by means of  
4 a digital audio transmission under a statutory license in  
5 accordance with section 114(f) or an exemption provided  
6 in section 114(d)(1)(B) or (C) the privilege of making no  
7 more than 1 phonorecord of the sound recording (unless  
8 the terms and conditions of the statutory license allow for  
9 more), if—

10           “(A) the phonorecord is retained and used sole-  
11 ly by the transmitting organization that made it,  
12 and no further phonorecords are reproduced from it;  
13 and

14           “(B) the phonorecord is used solely for the  
15 transmitting organization’s own transmissions in the  
16 United States under a statutory license in accord-  
17 ance with section 114(f) or an exemption provided in  
18 section 114(d)(1)(B) or (C);

19           “(C) unless preserved exclusively for purposes  
20 of archival preservation, the phonorecord is de-  
21 stroyed within 6 months from the date the sound re-  
22 cording was first transmitted to the public using the  
23 phonorecord; and

24           “(D) phonorecords of the sound recording have  
25 been distributed to the public in the United States

1 under the authority of the copyright owner or the  
2 copyright owner authorizes the transmitting entity  
3 to transmit the sound recording, and the transmit-  
4 ting entity makes the transmission from a phono-  
5 record lawfully made and acquired under this title.

6 “(3) Notwithstanding any provision of the antitrust  
7 laws, any copyright owners of sound recordings and any  
8 transmitting organizations entitled to obtain a statutory  
9 license under this subsection may negotiate and agree  
10 upon royalty rates and license terms and conditions for  
11 ephemeral recordings of such sound recordings and the  
12 proportionate division of fees paid among copyright own-  
13 ers, and may designate common agents to negotiate, agree  
14 to, pay, or receive such royalty payments.

15 “(4) No later than 30 days after the date of the en-  
16 actment of the Digital Millennium Copyright Act, the Li-  
17 brarian of Congress shall cause notice to be published in  
18 the Federal Register of the initiation of voluntary negotia-  
19 tion proceedings for the purpose of determining reasonable  
20 terms and rates of royalty payments for the activities spec-  
21 ified by paragraph (2) of this subsection during the period  
22 beginning on the date of the enactment of such Act and  
23 ending on December 31, 2000, or such other date as the  
24 parties may agree. Such rates shall include a minimum  
25 fee for each type of service. Any copyright owners of sound

1 recordings or any transmitting organizations entitled to  
2 obtain a statutory license under this subsection may sub-  
3 mit to the Librarian of Congress licenses covering such  
4 activities with respect to such sound recordings. The par-  
5 ties to each negotiation proceeding shall bear their own  
6 costs.

7       “(5) In the absence of license agreements negotiated  
8 under paragraph (3), during the 60-day period commene-  
9 ing 6 months after publication of the notice specified in  
10 paragraph (4), and upon the filing of a petition in accord-  
11 ance with section 803(a)(1), the Librarian of Congress  
12 shall, pursuant to chapter 8, convene a copyright arbitra-  
13 tion royalty panel to determine and publish in the Federal  
14 Register a schedule of reasonable rates and terms which,  
15 subject to paragraph (6), shall be binding on all copyright  
16 owners of sound recordings and transmitting organiza-  
17 tions entitled to obtain a statutory license under this sub-  
18 section during the period beginning on the date of the en-  
19 actment of the Digital Millennium Copyright Act and end-  
20 ing on December 31, 2000, or such other date as the par-  
21 ties may agree. Such rates shall include a minimum fee  
22 for each type of service. The copyright arbitration royalty  
23 panel shall establish rates that most clearly represent the  
24 fees that would have been negotiated in the marketplace  
25 between a willing buyer and a willing seller. In determin-



1 ing such rates and terms, the copyright arbitration royalty  
2 panel shall base its decision on economic, competitive, and  
3 programming information presented by the parties, includ-  
4 ing—

5           “(A) whether use of the service may substitute  
6 for or may promote the sales of phonorecords or oth-  
7 erwise interferes with or enhances the copyright  
8 owner’s traditional streams of revenue;

9           “(B) the relative rules of the copyright owner  
10 and the copyright user in the copyrighted work and  
11 the service made available to the public with respect  
12 to relative creative contribution, technological con-  
13 tribution, capital investment, cost, and risk.

14 In establishing such rates and terms, the copyright arbi-  
15 tration royalty panel may consider the rates and terms  
16 under voluntary license agreements negotiated as provided  
17 in paragraphs (3) and (4). The Librarian of Congress  
18 shall also establish requirements by which copyright own-  
19 ers may receive reasonable notice of the use of their sound  
20 recordings under this section, and under which records of  
21 such use shall be kept and made available by transmitting  
22 organizations entitled to obtain a statutory license under  
23 this subsection.

24           “(6) License agreements voluntarily negotiated at  
25 any time between 1 or more copyright owners of sound

1 recordings and 1 or more transmitting organizations enti-  
2 tled to obtain a statutory license under this subsection  
3 shall be given effect in lieu of any determination by a copy-  
4 right arbitration royalty panel or decision by the Librarian  
5 of Congress.

6       “(7) Publication of a notice of the initiation of vol-  
7 untary negotiation proceedings as specified in paragraph  
8 (4) shall be repeated, in accordance with regulations that  
9 the Librarian of Congress shall prescribe, in the first week  
10 of January 2000, and at 2-year intervals thereafter, ex-  
11 cept to the extent that different years for the repeating  
12 of such proceedings may be determined in accordance with  
13 paragraph (4). The procedures specified in paragraph (5)  
14 shall be repeated, in accordance with regulations that the  
15 Librarian of Congress shall prescribe, upon filing of a peti-  
16 tion in accordance with section 803(a)(1) during a 60-day  
17 period commencing on July 1, 2000, and at 2-year inter-  
18 vals thereafter, except to the extent that different years  
19 for the repeating of such proceedings may be determined  
20 in accordance with paragraph (4). The procedures speci-  
21 fied in paragraph (5) shall be concluded in accordance  
22 with section 802.

23       “(8)(A) Any person who wishes to make an ephem-  
24 eral recording of a sound recording under a statutory li-  
25 cense in accordance with this subsection may do so with-

1 out infringing the exclusive right of the copyright owner  
2 of the sound recording under section 106(1)—

3 “(i) by complying with such notice requirements  
4 as the Librarian of Congress shall prescribe by regu-  
5 lation and by paying royalty fees in accordance with  
6 this subsection; or

7 “(ii) if such royalty fees have not been set, by  
8 agreeing to pay such royalty fees as shall be deter-  
9 mined in accordance with this subsection.

10 “(B) Any royalty payments in arrears shall be made  
11 on or before the 20th day of the month next succeeding  
12 the month in which the royalty fees are set.

13 “(9) If a transmitting organization entitled to make  
14 a phonorecord under this subsection is prevented from  
15 making such phonorecord by reason of the application by  
16 the copyright owner of technical measures that prevent the  
17 reproduction of the sound recording, the copyright owner  
18 shall make available to the transmitting organization the  
19 necessary means for permitting the making of such phono-  
20 record within the meaning of this subsection, if it is tech-  
21 nologically feasible and economically reasonable for the  
22 copyright owner to do so. If the copyright owner fails to  
23 do so in a timely manner in light of the transmitting orga-  
24 nization’s reasonable business requirements, the transmit-  
25 ting organization shall not be liable for a violation of sec-

1 tion 1201(a)(1) of this title for engaging in such activities  
 2 as are necessary to make such phonorecords as permitted  
 3 under this subsection.”.

4 **SEC. 416. ASSUMPTION OF CONTRACTUAL OBLIGATIONS**  
 5 **RELATED TO TRANSFERS OF RIGHTS IN MO-**  
 6 **TION PICTURES.**

7 (a) IN GENERAL.—Part VI of title 28, United States  
 8 Code, is amended by adding at the end the following new  
 9 chapter:

10 **“CHAPTER 180—ASSUMPTION OF CERTAIN**  
 11 **CONTRACTUAL OBLIGATIONS**

“Sec.

“4001. Assumption of contractual obligations related to transfers of rights in  
 motion pictures.

12 **“§ 4001. Assumption of contractual obligations relat-**  
 13 **ed to transfers of rights in motion pic-**  
 14 **tures**

15 “(a) ASSUMPTION OF OBLIGATIONS.—In the case of  
 16 a transfer of copyright ownership in a motion picture (as  
 17 defined in section 101 of title 17) that is produced subject  
 18 to 1 or more collective bargaining agreements negotiated  
 19 under the laws of the United States, if the transfer is exe-  
 20 cuted on or after the effective date of this chapter and  
 21 is not limited to public performance rights, the transfer  
 22 instrument shall be deemed to incorporate the assumption  
 23 agreements applicable to the copyright ownership being  
 24 transferred that are required by the applicable collective

1 bargaining agreement, and the transferee shall be subject  
2 to the obligations under each such assumption agreement  
3 to make residual payments and provide related notices, ac-  
4 cruing after the effective date of the transfer and applica-  
5 ble to the exploitation of the rights transferred, and any  
6 remedies under each such assumption agreement for  
7 breach of those obligations, as those obligations and rem-  
8 edies are set forth in the applicable collective bargaining  
9 agreement, if—

10           “(1) the transferee knows or has reason to  
11           know at the time of the transfer that such collective  
12           bargaining agreement was or will be applicable to  
13           the motion picture; or

14           “(2) in the event of a court order confirming an  
15           arbitration award against the transferor under the  
16           collective bargaining agreement, the transferor does  
17           not have the financial ability to satisfy the award  
18           within 90 days after the order is issued.

19           “(b) FAILURE TO NOTIFY.—If the transferor under  
20           subsection (a) fails to notify the transferee under sub-  
21           section (a) of applicable collective bargaining obligations  
22           before the execution of the transfer instrument, and sub-  
23           section (a) is made applicable to the transferee solely by  
24           virtue of subsection (a)(2), the transferor shall be liable

1 to the transferee for any damages suffered by the trans-  
2 feree as a result of the failure to notify.

3 “(c) DETERMINATION OF DISPUTES AND CLAIMS.—  
4 Any dispute concerning the application of subsection (a)  
5 and any claim made under subsection (b) shall be deter-  
6 mined by an action in United States district court, and  
7 the court in its discretion may allow the recovery of full  
8 costs by or against any party and may also award a rea-  
9 sonable attorney’s fee to the prevailing party as part of  
10 the costs.”.

11 (b) CONFORMING AMENDMENT.—The table of chap-  
12 ters for part VI of title 28, United States Code, is amend-  
13 ed by adding at the end the following:

“180. Assumption of Certain Contractual Obligations ..... 4001”.

14 **SEC. 417. FIRST SALE CLARIFICATION.**

15 Section 109(a) of title 17, United States Code, is  
16 amended by striking the first sentence and inserting the  
17 following: “Notwithstanding the provisions of section  
18 106(3), the owner of a particular lawfully made copy or  
19 phonorecord that has been distributed in the United  
20 States by the authority of the copyright owner, or any per-  
21 son authorized by the owner of that copy or phonorecord,  
22 is entitled, without the authority of the copyright owner,  
23 to sell or otherwise dispose of the possession of that copy  
24 or phonorecord.”.



1 intangible material capable of being collected and or-  
2 ganized in a systematic way.

3 “(3) POTENTIAL MARKET.—The term ‘potential  
4 market’ means any market that a person claiming  
5 protection under section 1302 has current and de-  
6 monstrable plans to exploit or that is commonly ex-  
7 ploited by persons offering similar products or serv-  
8 ices incorporating collections of information.

9 “(4) COMMERCE.—The term ‘commerce’ means  
10 all commerce which may be lawfully regulated by the  
11 Congress.

12 “(5) PRODUCT OR SERVICE.—A product or  
13 service incorporating a collection of information does  
14 not include a product or service incorporating a col-  
15 lection of information gathered, organized, or main-  
16 tained to address, route, forward, transmit, or store  
17 digital online communications or provide or receive  
18 access to connections for digital online communica-  
19 tions.

20 **“§ 1302. Prohibition against misappropriation**

21 “Any person who extracts, or uses in commerce, all  
22 or a substantial part, measured either quantitatively or  
23 qualitatively, of a collection of information gathered, orga-  
24 nized, or maintained by another person through the invest-  
25 ment of substantial monetary or other resources, so as to



1 cause harm to the actual or potential market of that other  
2 person, or a successor in interest of that other person, for  
3 a product or service that incorporates that collection of  
4 information and is offered or intended to be offered for  
5 sale or otherwise in commerce by that other person, or  
6 a successor in interest of that person, shall be liable to  
7 that person or successor in interest for the remedies set  
8 forth in section 1306.

9 **“§ 1303. Permitted acts**

10       “(a) INDIVIDUAL ITEMS OF INFORMATION AND  
11 OTHER INSUBSTANTIAL PARTS.—Nothing in this chapter  
12 shall prevent the extraction or use of an individual item  
13 of information, or other insubstantial part of a collection  
14 of information, in itself. An individual item of information,  
15 including a work of authorship, shall not itself be consid-  
16 ered a substantial part of a collection of information under  
17 section 1302. Nothing in this subsection shall permit the  
18 repeated or systematic extraction or use of individual  
19 items or insubstantial parts of a collection of information  
20 so as to circumvent the prohibition contained in section  
21 1302.

22       “(b) GATHERING OR USE OF INFORMATION OB-  
23 TAINED THROUGH OTHER MEANS.—Nothing in this  
24 chapter shall restrict any person from independently gath-  
25 ering information or using information obtained by means

1 other than extracting it from a collection of information  
2 gathered, organized, or maintained by another person  
3 through the investment of substantial monetary or other  
4 resources.

5       “(c) USE OF INFORMATION FOR VERIFICATION.—  
6 Nothing in this chapter shall restrict any person from ex-  
7 tracting or using a collection of information within any  
8 entity or organization, for the sole purpose of verifying  
9 the accuracy of information independently gathered, orga-  
10 nized, or maintained by that person. Under no cir-  
11 cumstances shall the information so used be extracted  
12 from the original collection and made available to others  
13 in a manner that harms the actual or potential market  
14 for the collection of information from which it is extracted  
15 or used.

16       “(d) NONPROFIT EDUCATIONAL, SCIENTIFIC, OR RE-  
17 SEARCH USES.—Notwithstanding section 1302, no person  
18 shall be restricted from extracting or using information  
19 for nonprofit educational, scientific, or research purposes  
20 in a manner that does not harm directly the actual market  
21 for the product or service referred to in section 1302.

22       “(e) NEWS REPORTING.—Nothing in this chapter  
23 shall restrict any person from extracting or using informa-  
24 tion for the sole purpose of news reporting, including news  
25 gathering, dissemination, and comment, unless the infor-

1 mation so extracted or used is time sensitive and has been  
2 gathered by a news reporting entity, and the extraction  
3 or use is part of a consistent pattern engaged in for the  
4 purpose of direct competition.

5 “(f) TRANSFER OF COPY.—Nothing in this chapter  
6 shall restrict the owner of a particular lawfully made copy  
7 of all or part of a collection of information from selling  
8 or otherwise disposing of the possession of that copy.

9 **“§ 1304. Exclusions**

10 “(a) GOVERNMENT COLLECTIONS OF INFORMA-  
11 TION.—

12 “(1) EXCLUSION.—Protection under this chap-  
13 ter shall not extend to collections of information  
14 gathered, organized, or maintained by or for a gov-  
15 ernment entity, whether Federal, State, or local, in-  
16 cluding any employee or agent of such entity, or any  
17 person exclusively licensed by such entity, within the  
18 scope of the employment, agency, or license. Nothing  
19 in this subsection shall preclude protection under  
20 this chapter for information gathered, organized, or  
21 maintained by such an agent or licensee that is not  
22 within the scope of such agency or license, or by a  
23 Federal or State educational institution in the  
24 course of engaging in education or scholarship.

1           “(2) EXCEPTION.—The exclusion under para-  
2 graph (1) does not apply to any information re-  
3 quired to be collected and disseminated—

4           “(A) under the Securities Exchange Act of  
5 1934 by a national securities exchange, a reg-  
6 istered securities association, or a registered se-  
7 curities information processor, subject to sec-  
8 tion 1305(g) of this title; or

9           “(B) under the Commodity Exchange Act  
10 by a contract market, subject to section  
11 1305(g) of this title.

12       “(b) COMPUTER PROGRAMS.—

13           “(1) PROTECTION NOT EXTENDED.—Subject to  
14 paragraph (2), protection under this chapter shall  
15 not extend to computer programs, including, but not  
16 limited to, any computer program used in the manu-  
17 facture, production, operation, or maintenance of a  
18 collection of information, or any element of a com-  
19 puter program necessary to its operation.

20           “(2) INCORPORATED COLLECTIONS OF INFOR-  
21 MATION.—A collection of information that is other-  
22 wise subject to protection under this chapter is not  
23 disqualified from such protection solely because it is  
24 incorporated into a computer program.

1 **“§ 1305. Relationship to other laws**

2       “(a) OTHER RIGHTS NOT AFFECTED.—Subject to  
3 subsection (b), nothing in this chapter shall affect rights,  
4 limitations, or remedies concerning copyright, or any other  
5 rights or obligations relating to information, including  
6 laws with respect to patent, trademark, design rights,  
7 antitrust, trade secrets, privacy, access to public docu-  
8 ments, and the law of contract.

9       “(b) PREEMPTION OF STATE LAW.—On or after the  
10 effective date of this chapter, all rights that are equivalent  
11 to the rights specified in section 1302 with respect to the  
12 subject matter of this chapter shall be governed exclusively  
13 by Federal law, and no person is entitled to any equivalent  
14 right in such subject matter under the common law or  
15 statutes of any State. State laws with respect to trade-  
16 mark, design rights, antitrust, trade secrets, privacy, ac-  
17 cess to public documents, and the law of contract shall  
18 not be deemed to provide equivalent rights for purposes  
19 of this subsection.

20       “(c) RELATIONSHIP TO COPYRIGHT.—Protection  
21 under this chapter is independent of, and does not affect  
22 or enlarge the scope, duration, ownership, or subsistence  
23 of, any copyright protection or limitation, including, but  
24 not limited to, fair use, in any work of authorship that  
25 is contained in or consists in whole or part of a collection  
26 of information. This chapter does not provide any greater

1 protection to a work of authorship contained in a collec-  
2 tion of information, other than a work that is itself a col-  
3 lection of information, than is available to that work under  
4 any other chapter of this title.

5 “(d) ANTITRUST.—Nothing in this chapter shall limit  
6 in any way the constraints on the manner in which prod-  
7 ucts and services may be provided to the public that are  
8 imposed by Federal and State antitrust laws, including  
9 those regarding single suppliers of products and services.

10 “(e) LICENSING.—Nothing in this chapter shall re-  
11 strict the rights of parties freely to enter into licenses or  
12 any other contracts with respect to the use of collections  
13 of information.

14 “(f) COMMUNICATIONS ACT OF 1934.—Nothing in  
15 this chapter shall affect the operation of the provisions  
16 of the Communications Act of 1934 (47 U.S.C. 151 et  
17 seq.), or shall restrict any person from extracting or using  
18 subscriber list information, as such term is defined in sec-  
19 tion 222(f)(3) of the Communications Act of 1934 (47  
20 U.S.C. 222(f)(3)), for the purpose of publishing telephone  
21 directories in any format.

22 “(g) SECURITIES AND COMMODITIES MARKET IN-  
23 FORMATION.—

24 “(1) FEDERAL AGENCIES AND ACTS.—Nothing  
25 in this Act shall affect:

1           “(A) the operation of the provisions of the  
2           Securities Exchange Act of 1934 (15 U.S.C.  
3           78a et seq.) or the Commodity Exchange Act (7  
4           U.S.C. 1 et seq.);

5           “(B) the jurisdiction or authority of the  
6           Securities and Exchange Commission and the  
7           Commodity Futures Trading Commission; or

8           “(C) the functions and operations of self-  
9           regulatory organizations and securities informa-  
10          tion processors under the provisions of the Se-  
11          curities Exchange Act of 1934 and the rules  
12          and regulations thereunder, including making  
13          market information available pursuant to the  
14          provisions of that Act and the rules and regula-  
15          tions promulgated thereunder.

16          “(2) PROHIBITION.—Notwithstanding any pro-  
17          vision in subsection (a), (b), (c), (d), or (f) of section  
18          1303, nothing in this chapter shall permit the ex-  
19          traction, use, resale, or other disposition of real-time  
20          market information except as the Securities Ex-  
21          change Act of 1934, the Commodity Exchange Act,  
22          and the rules and regulations thereunder may other-  
23          wise provide. In addition, nothing in subsection (e)  
24          of section 1303 shall be construed to permit any  
25          person to extract or use real-time market informa-

1       tion in a manner that constitutes a market sub-  
2       stitute for a real-time market information service  
3       (including the real-time systematic updating of or  
4       display of a substantial part of market information)  
5       provided on a real-time basis.

6           “(3) DEFINITION.—As used in this subsection,  
7       the term ‘market information’ means information re-  
8       lating to quotations and transactions that is col-  
9       lected, processed, distributed, or published pursuant  
10      to the provisions of the Securities Exchange Act of  
11      1934 or by a contract market that is designated by  
12      the Commodity Futures Trading Commission pursu-  
13      ant to the Commodity Exchange Act and the rules  
14      and regulations thereunder.

15   **“§ 1306. Civil remedies**

16           “(a) CIVIL ACTIONS.—Any person who is injured by  
17      a violation of section 1302 may bring a civil action for  
18      such a violation in an appropriate United States district  
19      court without regard to the amount in controversy, except  
20      that any action against a State governmental entity may  
21      be brought in any court that has jurisdiction over claims  
22      against such entity.

23           “(b) TEMPORARY AND PERMANENT INJUNCTIONS.—  
24      Any court having jurisdiction of a civil action under this  
25      section shall have the power to grant temporary and per-



1 manent injunctions, according to the principles of equity  
2 and upon such terms as the court may deem reasonable,  
3 to prevent a violation of section 1302. Any such injunction  
4 may be served anywhere in the United States on the per-  
5 son enjoined, and may be enforced by proceedings in con-  
6 tempt or otherwise by any United States district court  
7 having jurisdiction over that person.

8       “(c) IMPOUNDMENT.—At any time while an action  
9 under this section is pending, the court may order the im-  
10 pounding, on such terms as it deems reasonable, of all cop-  
11 ies of contents of a collection of information extracted or  
12 used in violation of section 1302, and of all masters, tapes,  
13 disks, diskettes, or other articles by means of which such  
14 copies may be reproduced. The court may, as part of a  
15 final judgment or decree finding a violation of section  
16 1302, order the remedial modification or destruction of  
17 all copies of contents of a collection of information ex-  
18 tracted or used in violation of section 1302, and of all  
19 masters, tapes, disks, diskettes, or other articles by means  
20 of which such copies may be reproduced.

21       “(d) MONETARY RELIEF.—When a violation of sec-  
22 tion 1302 has been established in any civil action arising  
23 under this section, the plaintiff shall be entitled to recover  
24 any damages sustained by the plaintiff and defendant’s  
25 profits not taken into account in computing the damages

1 sustained by the plaintiff. The court shall assess such  
2 profits or damages or cause the same to be assessed under  
3 its direction. In assessing profits the plaintiff shall be re-  
4 quired to prove defendant's gross revenue only and the  
5 defendant shall be required to prove all elements of cost  
6 or deduction claims. In assessing damages the court may  
7 enter judgment, according to the circumstances of the  
8 case, for any sum above the amount found as actual dam-  
9 ages, not exceeding three times such amount. The court  
10 in its discretion may award reasonable costs and attor-  
11 ney's fees to the prevailing party and shall award such  
12 costs and fees where it determines that an action was  
13 brought under this chapter in bad faith against a non-  
14 profit educational, scientific, or research institution, li-  
15 brary, or archives, or an employee or agent of such an  
16 entity, acting within the scope of his or her employment.

17       “(e) REDUCTION OR REMISSION OF MONETARY RE-  
18 LIEF FOR NONPROFIT EDUCATIONAL, SCIENTIFIC, OR  
19 RESEARCH INSTITUTIONS.—The court shall reduce or  
20 remit entirely monetary relief under subsection (d) in any  
21 case in which a defendant believed and had reasonable  
22 grounds for believing that his or her conduct was permis-  
23 sible under this chapter, if the defendant was an employee  
24 or agent of a nonprofit educational, scientific, or research

1 institution, library, or archives acting within the scope of  
2 his or her employment.

3 “(f) ACTIONS AGAINST UNITED STATES GOVERN-  
4 MENT.—Subsections (b) and (c) shall not apply to any ac-  
5 tion against the United States Government.

6 “(g) RELIEF AGAINST STATE ENTITIES.—The relief  
7 provided under this section shall be available against a  
8 State governmental entity to the extent permitted by ap-  
9 plicable law.

10 **“§ 1307. Criminal offenses and penalties**

11 “(a) VIOLATION.—

12 “(1) IN GENERAL.—Any person who violates  
13 section 1302 willfully, and—

14 “(A) does so for direct or indirect commer-  
15 cial advantage or financial gain; or

16 “(B) causes loss or damage aggregating  
17 \$10,000 or more in any 1-year period to the  
18 person who gathered, organized, or maintained  
19 the information concerned,  
20 shall be punished as provided in subsection (b).

21 “(2) INAPPLICABILITY.—This section shall not  
22 apply to an employee or agent of a nonprofit edu-  
23 cational, scientific, or research institution, library, or  
24 archives acting within the scope of his or her em-  
25 ployment.

1       “(b) PENALTIES.—An offense under subsection (a)  
 2 shall be punishable by a fine of not more than \$250,000  
 3 or imprisonment for not more than 5 years, or both. A  
 4 second or subsequent offense under subsection (a) shall  
 5 be punishable by a fine of not more than \$500,000 or im-  
 6 prisonment for not more than 10 years, or both.

7       **“§ 1308. Limitations on actions**

8       “(a) CRIMINAL PROCEEDINGS.—No criminal pro-  
 9 ceeding shall be maintained under this chapter unless it  
 10 is commenced within three years after the cause of action  
 11 arises.

12       “(b) CIVIL ACTIONS.—No civil action shall be main-  
 13 tained under this chapter unless it is commenced within  
 14 three years after the cause of action arises or claim ac-  
 15 crues.

16       “(c) ADDITIONAL LIMITATION.—No criminal or civil  
 17 action shall be maintained under this chapter for the ex-  
 18 traction or use of all or a substantial part of a collection  
 19 of information that occurs more than 15 years after the  
 20 investment of resources that qualified the portion of the  
 21 collection of information for protection under this chapter  
 22 that is extracted or used.”.

23       **SEC. 503. CONFORMING AMENDMENT.**

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

**“13. Misappropriation of Collections of Information ..... 1301”.**

1 **SEC. 504. CONFORMING AMENDMENTS TO TITLE 28, UNITED**  
2 **STATES CODE.**

3 (a) DISTRICT COURT JURISDICTION.—Section 1338  
4 of title 28, United States Code, is amended—

5 (1) in the section heading by inserting “**mis-**  
6 **appropriations of collections of informa-**  
7 **tion,**” after “**trade-marks,**”; and

8 (2) by adding at the end the following:

9 “(d) The district courts shall have original jurisdic-  
10 tion of any civil action arising under chapter 13 of title  
11 17, relating to misappropriation of collections of informa-  
12 tion. Such jurisdiction shall be exclusive of the courts of  
13 the States, except that any action against a State govern-  
14 mental entity may be brought in any court that has juris-  
15 diction over claims against such entity.”.

16 (b) CONFORMING AMENDMENT.—The item relating  
17 to section 1338 in the table of sections for chapter 85 of  
18 title 28, United States Code, is amended by inserting  
19 “misappropriations of collections of information,” after  
20 “trade-marks,”.

21 (c) COURT OF FEDERAL CLAIMS JURISDICTION.—  
22 Section 1498(e) of title 28, United States Code, is amend-  
23 ed by inserting “and to protections afforded collections of  
24 information under chapter 13 of title 17” after “chapter  
25 9 of title 17”.

1 **SEC. 505. EFFECTIVE DATE.**

2 (a) IN GENERAL.—This title and the amendments  
3 made by this title shall take effect on the date of the en-  
4 actment of this Act, and shall apply to acts committed  
5 on or after that date.

6 (b) PRIOR ACTS NOT AFFECTED.—No person shall  
7 be liable under chapter 13 of title 17, United States Code,  
8 as added by section 502 of this Act, for the use of informa-  
9 tion lawfully extracted from a collection of information  
10 prior to the effective date of this Act, by that person or  
11 by that person’s predecessor in interest.

12 **TITLE VI—PROTECTION OF**  
13 **CERTAIN ORIGINAL DESIGNS**

14 **SEC. 601. SHORT TITLE.**

15 This Act may be referred to as the “Vessel Hull De-  
16 sign Protection Act”.

17 **SEC. 602. PROTECTION OF CERTAIN ORIGINAL DESIGNS.**

18 Title 17, United States Code, is amended by adding  
19 at the end the following new chapter:

**“CHAPTER 14—PROTECTION OF ORIGINAL DESIGNS**

“Sec.

“1401. Designs protected.

“1402. Designs not subject to protection.

“1403. Revisions, adaptations, and rearrangements.

“1404. Commencement of protection.

“1405. Term of protection.

“1406. Design notice.

“1407. Effect of omission of notice.

“1408. Exclusive rights.

“1409. Infringement.

“1410. Application for registration.

“1411. Benefit of earlier filing date in foreign country.

- “1412. Oaths and acknowledgments.
- “1413. Examination of application and issue or refusal of registration.
- “1414. Certification of registration.
- “1415. Publication of announcements and indexes.
- “1416. Fees.
- “1417. Regulations.
- “1418. Copies of records.
- “1419. Correction of errors in certificates.
- “1420. Ownership and transfer.
- “1421. Remedy for infringement.
- “1422. Injunctions.
- “1423. Recovery for infringement.
- “1424. Power of court over registration.
- “1425. Liability for action on registration fraudulently obtained.
- “1426. Penalty for false marking.
- “1427. Penalty for false representation.
- “1428. Enforcement by Treasury and Postal Service .
- “1429. Relation to design patent law.
- “1430. Common law and other rights unaffected.
- “1431. Administrator; Office of the Administrator.
- “1432. No retroactive effect.

1 **“§ 1401. Designs protected**

2 “(a) DESIGNS PROTECTED.—

3 “(1) IN GENERAL.—The designer or other  
 4 owner of an original design of a useful article which  
 5 makes the article attractive or distinctive in appear-  
 6 ance to the purchasing or using public may secure  
 7 the protection provided by this chapter upon comply-  
 8 ing with and subject to this chapter.

9 “(2) VESSEL HULLS.—The design of a vessel  
 10 hull, including a plug or mold, is subject to protec-  
 11 tion under this chapter, notwithstanding section  
 12 1402(4).

13 “(b) DEFINITIONS.—For the purpose of this chapter,  
 14 the following terms have the following meanings:

1           “(1) A design is ‘original’ if it is the result of  
2 the designer’s creative endeavor that provides a dis-  
3 tinguishable variation over prior work pertaining to  
4 similar articles which is more than merely trivial and  
5 has not been copied from another source.

6           “(2) A ‘useful article’ is a vessel hull, including  
7 a plug or mold, which in normal use has an intrinsic  
8 utilitarian function that is not merely to portray the  
9 appearance of the article or to convey information.  
10 An article which normally is part of a useful article  
11 shall be deemed to be a useful article.

12           “(3) A ‘vessel’ is a craft, especially one larger  
13 than a rowboat, designed to navigate on water, but  
14 does not include any such craft that exceeds 200  
15 feet in length.

16           “(4) A ‘hull’ is the frame or body of a vessel,  
17 including the deck of a vessel, exclusive of masts,  
18 sails, yards, and rigging.

19           “(5) A ‘plug’ means a device or model used to  
20 make a mold for the purpose of exact duplication,  
21 regardless of whether the device or model has an in-  
22 trinsic utilitarian function that is not only to portray  
23 the appearance of the product or to convey informa-  
24 tion.



1           “(6) A ‘mold’ means a matrix or form in which  
2           a substance for material is used, regardless of  
3           whether the matrix or form has an intrinsic utilitar-  
4           ian function that is not only to portray the appear-  
5           ance of the product or to convey information.

6   **“§ 1402. Designs not subject to protection**

7           “Protection under this chapter shall not be available  
8           for a design that is—

9           “(1) not original;

10           “(2) staple or commonplace, such as a standard  
11           geometric figure, a familiar symbol, an emblem, or  
12           a motif, or another shape, pattern, or configuration  
13           which has become standard, common, prevalent, or  
14           ordinary;

15           “(3) different from a design excluded by para-  
16           graph (2) only in insignificant details or in elements  
17           which are variants commonly used in the relevant  
18           trades;

19           “(4) dictated solely by a utilitarian function of  
20           the article that embodies it; or

21           “(5) embodied in a useful article that was made  
22           public by the designer or owner in the United States  
23           or a foreign country more than 1 year before the  
24           date of the application for registration under this  
25           chapter.

1 **“§ 1403. Revisions, adaptations, and rearrangements**

2       “Protection for a design under this chapter shall be  
3 available notwithstanding the employment in the design  
4 of subject matter excluded from protection under section  
5 1402 if the design is a substantial revision, adaptation,  
6 or rearrangement of such subject matter. Such protection  
7 shall be independent of any subsisting protection in sub-  
8 ject matter employed in the design, and shall not be con-  
9 strued as securing any right to subject matter excluded  
10 from protection under this chapter or as extending any  
11 subsisting protection under this chapter.

12 **“§ 1404. Commencement of protection**

13       “The protection provided for a design under this  
14 chapter shall commence upon the earlier of the date of  
15 publication of the registration under section 1413(a) or  
16 the date the design is first made public as defined by sec-  
17 tion 1410(b).

18 **“§ 1405. Term of protection**

19       “(a) IN GENERAL.—Subject to subsection (b), the  
20 protection provided under this chapter for a design shall  
21 continue for a term of 10 years beginning on the date of  
22 the commencement of protection under section 1404.

23       “(b) EXPIRATION.—All terms of protection provided  
24 in this section shall run to the end of the calendar year  
25 in which they would otherwise expire.

1       “(c) TERMINATION OF RIGHTS.—Upon expiration or  
2 termination of protection in a particular design under this  
3 chapter, all rights under this chapter in the design shall  
4 terminate, regardless of the number of different articles  
5 in which the design may have been used during the term  
6 of its protection.

7       **“§ 1406. Design notice**

8       “(a) CONTENTS OF DESIGN NOTICE.—(1) Whenever  
9 any design for which protection is sought under this chap-  
10 ter is made public under section 1410(b), the owner of  
11 the design shall, subject to the provisions of section 1407,  
12 mark it or have it marked legibly with a design notice con-  
13 sisting of—

14               “(A) the words ‘Protected Design’, the abbrevi-  
15               viation ‘Prot’d Des.’, or the letter ‘D’ with a circle,  
16               or the symbol \*D\*;

17               “(B) the year of the date on which protection  
18               for the design commenced; and

19               “(C) the name of the owner, an abbreviation by  
20               which the name can be recognized, or a generally ac-  
21               cepted alternative designation of the owner.

22 Any distinctive identification of the owner may be used  
23 for purposes of subparagraph (C) if it has been recorded  
24 by the Administrator before the design marked with such  
25 identification is registered.

1       “(2) After registration, the registration number may  
2 be used instead of the elements specified in subparagraphs  
3 (B) and (C) of paragraph (1).

4       “(b) LOCATION OF NOTICE.—The design notice shall  
5 be so located and applied as to give reasonable notice of  
6 design protection while the useful article embodying the  
7 design is passing through its normal channels of com-  
8 merce.

9       “(c) SUBSEQUENT REMOVAL OF NOTICE.—When the  
10 owner of a design has complied with the provisions of this  
11 section, protection under this chapter shall not be affected  
12 by the removal, destruction, or obliteration by others of  
13 the design notice on an article.

14       **“§ 1407. Effect of omission of notice**

15       “(a) ACTIONS WITH NOTICE.—Except as provided in  
16 subsection (b), the omission of the notice prescribed in sec-  
17 tion 1406 shall not cause loss of the protection under this  
18 chapter or prevent recovery for infringement under this  
19 chapter against any person who, after receiving written  
20 notice of the design protection, begins an undertaking  
21 leading to infringement under this chapter.

22       “(b) ACTIONS WITHOUT NOTICE.—The omission of  
23 the notice prescribed in section 1406 shall prevent any re-  
24 covery under section 1423 against a person who began an  
25 undertaking leading to infringement under this chapter

1 before receiving written notice of the design protection. No  
2 injunction shall be issued under this chapter with respect  
3 to such undertaking unless the owner of the design reim-  
4 burses that person for any reasonable expenditure or con-  
5 tractual obligation in connection with such undertaking  
6 that was incurred before receiving written notice of the  
7 design protection, as the court in its discretion directs.  
8 The burden of providing written notice of design protec-  
9 tion shall be on the owner of the design.

10 **“§ 1408. Exclusive rights**

11 “The owner of a design protected under this chapter  
12 has the exclusive right to—

13 “(1) make, have made, or import, for sale or  
14 for use in trade, any useful article embodying that  
15 design; and

16 “(2) sell or distribute for sale or for use in  
17 trade any useful article embodying that design.

18 **“§ 1409. Infringement**

19 “(a) ACTS OF INFRINGEMENT.—Except as provided  
20 in subsection (b), it shall be infringement of the exclusive  
21 rights in a design protected under this chapter for any  
22 person, without the consent of the owner of the design,  
23 within the United States and during the term of such pro-  
24 tection, to—

1           “(1) make, have made, or import, for sale or  
2           for use in trade, any infringing article as defined in  
3           subsection (e); or

4           “(2) sell or distribute for sale or for use in  
5           trade any such infringing article.

6           “(b) ACTS OF SELLERS AND DISTRIBUTORS.—A sell-  
7           er or distributor of an infringing article who did not make  
8           or import the article shall be deemed to have infringed  
9           on a design protected under this chapter only if that per-  
10          son—

11           “(1) induced or acted in collusion with a manu-  
12          facturer to make, or an importer to import such ar-  
13          ticle, except that merely purchasing or giving an  
14          order to purchase such article in the ordinary course  
15          of business shall not of itself constitute such induce-  
16          ment or collusion; or

17           “(2) refused or failed, upon the request of the  
18          owner of the design, to make a prompt and full dis-  
19          closure of that person’s source of such article, and  
20          that person orders or reorders such article after re-  
21          ceiving notice by registered or certified mail of the  
22          protection subsisting in the design.

23           “(c) ACTS WITHOUT KNOWLEDGE.—It shall not be  
24          infringement under this section to make, have made, im-  
25          port, sell, or distribute, any article embodying a design

1 which was created without knowledge that a design was  
2 protected under this chapter and was copied from such  
3 protected design.

4 “(d) ACTS IN ORDINARY COURSE OF BUSINESS.—A  
5 person who incorporates into that person’s product of  
6 manufacture an infringing article acquired from others in  
7 the ordinary course of business, or who, without knowl-  
8 edge of the protected design embodied in an infringing ar-  
9 ticle, makes or processes the infringing article for the ac-  
10 count of another person in the ordinary course of business,  
11 shall not be deemed to have infringed the rights in that  
12 design under this chapter except under a condition con-  
13 tained in paragraph (1) or (2) of subsection (b). Accepting  
14 an order or reorder from the source of the infringing arti-  
15 cle shall be deemed ordering or reordering within the  
16 meaning of subsection (b)(2).

17 “(e) INFRINGING ARTICLE DEFINED.—As used in  
18 this section, an ‘infringing article’ is any article the design  
19 of which has been copied from a design protected under  
20 this chapter, without the consent of the owner of the pro-  
21 tected design. An infringing article is not an illustration  
22 or picture of a protected design in an advertisement, book,  
23 periodical, newspaper, photograph, broadcast, motion pic-  
24 ture, or similar medium. A design shall not be deemed to  
25 have been copied from a protected design if it is original

1 and not substantially similar in appearance to a protected  
2 design.

3 “(f) ESTABLISHING ORIGINALITY.—The party to any  
4 action or proceeding under this chapter who alleges rights  
5 under this chapter in a design shall have the burden of  
6 establishing the design’s originality whenever the opposing  
7 party introduces an earlier work which is identical to such  
8 design, or so similar as to make prima facie showing that  
9 such design was copied from such work.

10 “(g) REPRODUCTION FOR TEACHING OR ANALY-  
11 SIS.—It is not an infringement of the exclusive rights of  
12 a design owner for a person to reproduce the design in  
13 a useful article or in any other form solely for the purpose  
14 of teaching, analyzing, or evaluating the appearance, con-  
15 cepts, or techniques embodied in the design, or the func-  
16 tion of the useful article embodying the design.

17 **“§ 1410. Application for registration**

18 “(a) TIME LIMIT FOR APPLICATION FOR REGISTRA-  
19 TION.—Protection under this chapter shall be lost if appli-  
20 cation for registration of the design is not made within  
21 two years after the date on which the design is first made  
22 public.

23 “(b) WHEN DESIGN IS MADE PUBLIC.—A design is  
24 made public when an existing useful article embodying the  
25 design is anywhere publicly exhibited, publicly distributed,



1 or offered for sale or sold to the public by the owner of  
2 the design or with the owner's consent.

3       “(c) APPLICATION BY OWNER OF DESIGN.—Applica-  
4 tion for registration may be made by the owner of the de-  
5 sign.

6       “(d) CONTENTS OF APPLICATION.—The application  
7 for registration shall be made to the Administrator and  
8 shall state—

9           “(1) the name and address of the designer or  
10 designers of the design;

11           “(2) the name and address of the owner if dif-  
12 ferent from the designer;

13           “(3) the specific name of the useful article em-  
14 bodying the design;

15           “(4) the date, if any, that the design was first  
16 made public, if such date was earlier than the date  
17 of the application;

18           “(5) affirmation that the design has been fixed  
19 in a useful article; and

20           “(6) such other information as may be required  
21 by the Administrator.

22 The application for registration may include a description  
23 setting forth the salient features of the design, but the  
24 absence of such a description shall not prevent registration  
25 under this chapter.

1       “(e) SWORN STATEMENT.—The application for reg-  
2 istration shall be accompanied by a statement under oath  
3 by the applicant or the applicant’s duly authorized agent  
4 or representative, setting forth, to the best of the appli-  
5 cant’s knowledge and belief—

6               “(1) that the design is original and was created  
7 by the designer or designers named in the applica-  
8 tion;

9               “(2) that the design has not previously been  
10 registered on behalf of the applicant or the appli-  
11 cant’s predecessor in title; and

12               “(3) that the applicant is the person entitled to  
13 protection and to registration under this chapter.

14 If the design has been made public with the design notice  
15 prescribed in section 1406, the statement shall also de-  
16 scribe the exact form and position of the design notice.

17       “(f) EFFECT OF ERRORS.—(1) Error in any state-  
18 ment or assertion as to the utility of the useful article  
19 named in the application under this section, the design  
20 of which is sought to be registered, shall not affect the  
21 protection secured under this chapter.

22               “(2) Errors in omitting a joint designer or in naming  
23 an alleged joint designer shall not affect the validity of  
24 the registration, or the actual ownership or the protection

1 of the design, unless it is shown that the error occurred  
2 with deceptive intent.

3 “(g) DESIGN MADE IN SCOPE OF EMPLOYMENT.—

4 In a case in which the design was made within the regular  
5 scope of the designer’s employment and individual author-  
6 ship of the design is difficult or impossible to ascribe and  
7 the application so states, the name and address of the em-  
8 ployer for whom the design was made may be stated in-  
9 stead of that of the individual designer.

10 “(h) PICTORIAL REPRESENTATION OF DESIGN.—

11 The application for registration shall be accompanied by  
12 two copies of a drawing or other pictorial representation  
13 of the useful article embodying the design, having one or  
14 more views, adequate to show the design, in a form and  
15 style suitable for reproduction, which shall be deemed a  
16 part of the application.

17 “(i) DESIGN IN MORE THAN ONE USEFUL ARTI-

18 CLE.—If the distinguishing elements of a design are in  
19 substantially the same form in different useful articles, the  
20 design shall be protected as to all such useful articles when  
21 protected as to one of them, but not more than one reg-  
22 istration shall be required for the design.

23 “(j) APPLICATION FOR MORE THAN ONE DESIGN.—

24 More than one design may be included in the same appli-  
25 cation under such conditions as may be prescribed by the

1 Administrator. For each design included in an application  
2 the fee prescribed for a single design shall be paid.

3 **“§ 1411. Benefit of earlier filing date in foreign coun-**  
4 **try**

5 “An application for registration of a design filed in  
6 the United States by any person who has, or whose legal  
7 representative or predecessor or successor in title has, pre-  
8 viously filed an application for registration of the same  
9 design in a foreign country which extends to designs of  
10 owners who are citizens of the United States, or to appli-  
11 cations filed under this chapter, similar protection to that  
12 provided under this chapter shall have that same effect  
13 as if filed in the United States on the date on which the  
14 application was first filed in such foreign country, if the  
15 application in the United States is filed within 6 months  
16 after the earliest date on which any such foreign applica-  
17 tion was filed.

18 **“§ 1412. Oaths and acknowledgments**

19 “(a) IN GENERAL.—Oaths and acknowledgments re-  
20 quired by this chapter—

21 “(1) may be made—

22 “(A) before any person in the United  
23 States authorized by law to administer oaths; or

24 “(B) when made in a foreign country, be-  
25 fore any diplomatic or consular officer of the

1 United States authorized to administer oaths,  
2 or before any official authorized to administer  
3 oaths in the foreign country concerned, whose  
4 authority shall be proved by a certificate of a  
5 diplomatic or consular officer of the United  
6 States; and

7 “(2) shall be valid if they comply with the laws  
8 of the State or country where made.

9 “(b) WRITTEN DECLARATION IN LIEU OF OATH.—

10 (1) The Administrator may by rule prescribe that any doc-  
11 ument which is to be filed under this chapter in the Office  
12 of the Administrator and which is required by any law,  
13 rule, or other regulation to be under oath, may be sub-  
14 scribed to by a written declaration in such form as the  
15 Administrator may prescribe, and such declaration shall  
16 be in lieu of the oath otherwise required.

17 “(2) Whenever a written declaration under paragraph  
18 (1) is used, the document containing the declaration shall  
19 state that willful false statements are punishable by fine  
20 or imprisonment, or both, pursuant to section 1001 of title  
21 18, and may jeopardize the validity of the application or  
22 document or a registration resulting therefrom.

1 **“§ 1413. Examination of application and issue or re-**  
2 **fusal of registration**

3 “(a) DETERMINATION OF REGISTRABILITY OF DE-  
4 SIGN; REGISTRATION.—Upon the filing of an application  
5 for registration in proper form under section 1410, and  
6 upon payment of the fee prescribed under section 1416,  
7 the Administrator shall determine whether or not the ap-  
8 plication relates to a design which on its face appears to  
9 be subject to protection under this chapter, and, if so, the  
10 Register shall register the design. Registration under this  
11 subsection shall be announced by publication. The date of  
12 registration shall be the date of publication.

13 “(b) REFUSAL TO REGISTER; RECONSIDERATION.—  
14 If, in the judgment of the Administrator, the application  
15 for registration relates to a design which on its face is  
16 not subject to protection under this chapter, the Adminis-  
17 trator shall send to the applicant a notice of refusal to  
18 register and the grounds for the refusal. Within 3 months  
19 after the date on which the notice of refusal is sent, the  
20 applicant may, by written request, seek reconsideration of  
21 the application. After consideration of such a request, the  
22 Administrator shall either register the design or send to  
23 the applicant a notice of final refusal to register.

24 “(c) APPLICATION TO CANCEL REGISTRATION.—Any  
25 person who believes he or she is or will be damaged by  
26 a registration under this chapter may, upon payment of

1 the prescribed fee, apply to the Administrator at any time  
2 to cancel the registration on the ground that the design  
3 is not subject to protection under this chapter, stating the  
4 reasons for the request. Upon receipt of an application for  
5 cancellation, the Administrator shall send to the owner of  
6 the design, as shown in the records of the Office of the  
7 Administrator, a notice of the application, and the owner  
8 shall have a period of 3 months after the date on which  
9 such notice is mailed in which to present arguments to  
10 the Administrator for support of the validity of the reg-  
11 istration. The Administrator shall also have the authority  
12 to establish, by regulation, conditions under which the op-  
13 posing parties may appear and be heard in support of  
14 their arguments. If, after the periods provided for the  
15 presentation of arguments have expired, the Administrator  
16 determines that the applicant for cancellation has estab-  
17 lished that the design is not subject to protection under  
18 this chapter, the Administrator shall order the registration  
19 stricken from the record. Cancellation under this sub-  
20 section shall be announced by publication, and notice of  
21 the Administrator's final determination with respect to  
22 any application for cancellation shall be sent to the appli-  
23 cant and to the owner of record.

1 **“§ 1414. Certification of registration**

2 “Certificates of registration shall be issued in the  
3 name of the United States under the seal of the Office  
4 of the Administrator and shall be recorded in the official  
5 records of the Office. The certificate shall state the name  
6 of the useful article, the date of filing of the application,  
7 the date of registration, and the date the design was made  
8 public, if earlier than the date of filing of the application,  
9 and shall contain a reproduction of the drawing or other  
10 pictorial representation of the design. If a description of  
11 the salient features of the design appears in the applica-  
12 tion, the description shall also appear in the certificate.  
13 A certificate of registration shall be admitted in any court  
14 as prima facie evidence of the facts stated in the certifi-  
15 cate.

16 **“§ 1415. Publication of announcements and indexes**

17 “(a) PUBLICATIONS OF THE ADMINISTRATOR.—The  
18 Administrator shall publish lists and indexes of registered  
19 designs and cancellations of designs and may also publish  
20 the drawings or other pictorial representations of reg-  
21 istered designs for sale or other distribution.

22 “(b) FILE OF REPRESENTATIVES OF REGISTERED  
23 DESIGNS.—The Administrator shall establish and main-  
24 tain a file of the drawings or other pictorial representa-  
25 tions of registered designs. The file shall be available for



1 use by the public under such conditions as the Adminis-  
2 trator may prescribe.

3 **“§ 1416. Fees**

4 “The Administrator shall by regulation set reason-  
5 able fees for the filing of applications to register designs  
6 under this chapter and for other services relating to the  
7 administration of this chapter, taking into consideration  
8 the cost of providing these services and the benefit of a  
9 public record.

10 **“§ 1417. Regulations**

11 “The Administrator may establish regulations for the  
12 administration of this chapter.

13 **“§ 1418. Copies of records**

14 “Upon payment of the prescribed fee, any person may  
15 obtain a certified copy of any official record of the Office  
16 of the Administrator that relates to this chapter. That  
17 copy shall be admissible in evidence with the same effect  
18 as the original.

19 **“§ 1419. Correction of errors in certificates**

20 “The Administrator may, by a certificate of correc-  
21 tion under seal, correct any error in a registration in-  
22 curred through the fault of the Office, or, upon payment  
23 of the required fee, any error of a clerical or typographical  
24 nature occurring in good faith but not through the fault  
25 of the Office. Such registration, together with the certifi-

1 cate, shall thereafter have the same effect as if it had been  
2 originally issued in such corrected form.

3 **“§ 1420. Ownership and transfer**

4 “(a) PROPERTY RIGHT IN DESIGN.—The property  
5 right in a design subject to protection under this chapter  
6 shall vest in the designer, the legal representatives of a  
7 deceased designer or of one under legal incapacity, the em-  
8 ployer for whom the designer created the design in the  
9 case of a design made within the regular scope of the de-  
10 signer’s employment, or a person to whom the rights of  
11 the designer or of such employer have been transferred.  
12 The person in whom the property right is vested shall be  
13 considered the owner of the design.

14 “(b) TRANSFER OF PROPERTY RIGHT.—The prop-  
15 erty right in a registered design, or a design for which  
16 an application for registration has been or may be filed,  
17 may be assigned, granted, conveyed, or mortgaged by an  
18 instrument in writing, signed by the owner, or may be be-  
19 queathed by will.

20 “(c) OATH OR ACKNOWLEDGEMENT OF TRANS-  
21 FER.—An oath or acknowledgment under section 1412  
22 shall be prima facie evidence of the execution of an assign-  
23 ment, grant, conveyance, or mortgage under subsection  
24 (b).

1       “(d) RECORDATION OF TRANSFER.—An assignment,  
2 grant, conveyance, or mortgage under subsection (b) shall  
3 be void as against any subsequent purchaser or mortgagee  
4 for a valuable consideration, unless it is recorded in the  
5 Office of the Administrator within 3 months after its date  
6 of execution or before the date of such subsequent pur-  
7 chase or mortgage.

8       **“§ 1421. Remedy for infringement**

9       “(a) IN GENERAL.—The owner of a design is enti-  
10 tled, after issuance of a certificate of registration of the  
11 design under this chapter, to institute an action for any  
12 infringement of the design.

13       “(b) REVIEW OF REFUSAL TO REGISTER.—(1) Sub-  
14 ject to paragraph (2), the owner of a design may seek judi-  
15 cial review of a final refusal of the Administrator to reg-  
16 ister the design under this chapter by bringing a civil ac-  
17 tion, and may in the same action, if the court adjudges  
18 the design subject to protection under this chapter, en-  
19 force the rights in that design under this chapter.

20       “(2) The owner of a design may seek judicial review  
21 under this section if—

22               “(A) the owner has previously duly filed and  
23 prosecuted to final refusal an application in proper  
24 form for registration of the design;

1           “(B) the owner causes a copy of the complaint  
2           in the action to be delivered to the Administrator  
3           within 10 days after the commencement of the ac-  
4           tion; and

5           “(C) the defendant has committed acts in re-  
6           spect to the design which would constitute infringe-  
7           ment with respect to a design protected under this  
8           chapter.

9           “(c) ADMINISTRATOR AS PARTY TO ACTION.—The  
10          Administrator may, at the Administrator’s option, become  
11          a party to the action with respect to the issue of  
12          registrability of the design claim by entering an appear-  
13          ance within 60 days after being served with the complaint,  
14          but the failure of the Administrator to become a party  
15          shall not deprive the court of jurisdiction to determine that  
16          issue.

17          “(d) USE OF ARBITRATION TO RESOLVE DISPUTE.—  
18          The parties to an infringement dispute under this chapter,  
19          within such time as may be specified by the Administrator  
20          by regulation, may determine the dispute, or any aspect  
21          of the dispute, by arbitration. Arbitration shall be gov-  
22          erned by title 9. The parties shall give notice of any arbi-  
23          tration award to the Administrator, and such award shall,  
24          as between the parties to the arbitration, be dispositive  
25          of the issues to which it relates. The arbitration award

1 shall be unenforceable until such notice is given. Nothing  
2 in this subsection shall preclude the Administrator from  
3 determining whether a design is subject to registration in  
4 a cancellation proceeding under section 1413(c).

5 **§ 1422. Injunctions**

6 “(a) IN GENERAL.—A court having jurisdiction over  
7 actions under this chapter may grant injunctions in ac-  
8 cordance with the principles of equity to prevent infringe-  
9 ment of a design under this chapter, including, in its dis-  
10 cretion, prompt relief by temporary restraining orders and  
11 preliminary injunctions.

12 “(b) DAMAGES FOR INJUNCTIVE RELIEF WRONG-  
13 FULLY OBTAINED.—A seller or distributor who suffers  
14 damage by reason of injunctive relief wrongfully obtained  
15 under this section has a cause of action against the appli-  
16 cant for such injunctive relief and may recover such relief  
17 as may be appropriate, including damages for lost profits,  
18 cost of materials, loss of good will, and punitive damages  
19 in instances where the injunctive relief was sought in bad  
20 faith, and, unless the court finds extenuating cir-  
21 cumstances, reasonable attorney’s fees.

22 **“§ 1423. Recovery for infringement**

23 “(a) DAMAGES.—Upon a finding for the claimant in  
24 an action for infringement under this chapter, the court  
25 shall award the claimant damages adequate to compensate

1 for the infringement. In addition, the court may increase  
2 the damages to such amount, not exceeding \$50,000 or  
3 \$1 per copy, whichever is greater, as the court determines  
4 to be just. The damages awarded shall constitute com-  
5 pensation and not a penalty. The court may receive expert  
6 testimony as an aid to the determination of damages.

7       “(b) INFRINGER’S PROFITS.—As an alternative to  
8 the remedies provided in subsection (a), the court may  
9 award the claimant the infringer’s profits resulting from  
10 the sale of the copies if the court finds that the infringer’s  
11 sales are reasonably related to the use of the claimant’s  
12 design. In such a case, the claimant shall be required to  
13 prove only the amount of the infringer’s sales and the in-  
14 fringer shall be required to prove its expenses against such  
15 sales.

16       “(c) STATUTE OF LIMITATIONS.—No recovery under  
17 subsection (a) or (b) shall be had for any infringement  
18 committed more than 3 years before the date on which  
19 the complaint is filed.

20       “(d) ATTORNEY’S FEES.—In an action for infringe-  
21 ment under this chapter, the court may award reasonable  
22 attorney’s fees to the prevailing party.

23       “(e) DISPOSITION OF INFRINGING AND OTHER ARTI-  
24 CLES.—The court may order that all infringing articles,  
25 and any plates, molds, patterns, models, or other means

1 specifically adapted for making the articles, be delivered  
2 up for destruction or other disposition as the court may  
3 direct.

4 **“§ 1424. Power of court over registration**

5 “In any action involving the protection of a design  
6 under this chapter, the court, when appropriate, may  
7 order registration of a design under this chapter or the  
8 cancellation of such a registration. Any such order shall  
9 be certified by the court to the Administrator, who shall  
10 make an appropriate entry upon the record.

11 **“§ 1425. Liability for action on registration fraudu-**  
12 **lently obtained**

13 “Any person who brings an action for infringement  
14 knowing that registration of the design was obtained by  
15 a false or fraudulent representation materially affecting  
16 the rights under this chapter, shall be liable in the sum  
17 of \$10,000, or such part of that amount as the court may  
18 determine. That amount shall be to compensate the de-  
19 fendant and shall be charged against the plaintiff and paid  
20 to the defendant, in addition to such costs and attorney’s  
21 fees of the defendant as may be assessed by the court.

22 **“§ 1426. Penalty for false marking**

23 “(a) IN GENERAL.—Whoever, for the purpose of de-  
24 ceiving the public, marks upon, applies to, or uses in ad-  
25 vertising in connection with an article made, used, distrib-

1 uted, or sold, a design which is not protected under this  
2 chapter, a design notice specified in section 1406, or any  
3 other words or symbols importing that the design is pro-  
4 tected under this chapter, knowing that the design is not  
5 so protected, shall pay a civil fine of not more than \$500  
6 for each such offense.

7 “(b) **SUIT BY PRIVATE PERSONS.**—Any person may  
8 sue for the penalty established by subsection (a), in which  
9 event one-half of the penalty shall be awarded to the per-  
10 son suing and the remainder shall be awarded to the  
11 United States.

12 **“§ 1427. Penalty for false representation**

13 “Whoever knowingly makes a false representation  
14 materially affecting the rights obtainable under this chap-  
15 ter for the purpose of obtaining registration of a design  
16 under this chapter shall pay a penalty of not less than  
17 \$500 and not more than \$1,000, and any rights or privi-  
18 leges that individual may have in the design under this  
19 chapter shall be forfeited.

20 **“§ 1428. Enforcement by Treasury and Postal Service**

21 “(a) **REGULATIONS.**—The Secretary of the Treasury  
22 and the United States Postal Service shall separately or  
23 jointly issue regulations for the enforcement of the rights  
24 set forth in section 1408 with respect to importation. Such  
25 regulations may require, as a condition for the exclusion



1 of articles from the United States, that the person seeking  
2 exclusion take any one or more of the following actions:

3           “(1) Obtain a court order enjoining, or an order  
4           of the International Trade Commission under sec-  
5           tion 337 of the Tariff Act of 1930 excluding, impor-  
6           tation of the articles.

7           “(2) Furnish proof that the design involved is  
8           protected under this chapter and that the importa-  
9           tion of the articles would infringe the rights in the  
10          design under this chapter.

11          “(3) Post a surety bond for any injury that  
12          may result if the detention or exclusion of the arti-  
13          cles proves to be unjustified.

14          “(b) SEIZURE AND FORFEITURE.—Articles imported  
15 in violation of the rights set forth in section 1408 are sub-  
16 ject to seizure and forfeiture in the same manner as prop-  
17 erty imported in violation of the customs laws. Any such  
18 forfeited articles shall be destroyed as directed by the Sec-  
19 retary of the Treasury or the court, as the case may be,  
20 except that the articles may be returned to the country  
21 of export whenever it is shown to the satisfaction of the  
22 Secretary of the Treasury that the importer had no rea-  
23 sonable grounds for believing that his or her acts con-  
24 stituted a violation of the law.

1 **“§ 1429. Relation to design patent law**

2 “The issuance of a design patent under title 35 for  
3 an original design for an article of manufacture shall ter-  
4 minate any protection of the original design under this  
5 chapter.

6 **“§ 1430. Common law and other rights unaffected**

7 “Nothing in this chapter shall annul or limit—

8 “(1) common law or other rights or remedies,  
9 if any, available to or held by any person with re-  
10 spect to a design which has not been registered  
11 under this chapter; or

12 “(2) any right under the trademark laws or any  
13 right protected against unfair competition.

14 **“§ 1431. Administrator; Office of the Administrator**

15 “In this chapter, the ‘Administrator’ is the Register  
16 of Copyrights, and the ‘Office of the Administrator’ and  
17 the ‘Office’ refer to the Copyright Office of the Library  
18 of Congress.

19 **“§ 1432. No retroactive effect**

20 “Protection under this chapter shall not be available  
21 for any design that has been made public under section  
22 1410(b) before the effective date of this chapter.”.

1 **SEC. 603. CONFORMING AMENDMENTS.**

2 (a) TABLE OF CHAPTERS.—The table of chapters for  
3 title 17, United States Code, is amended by adding at the  
4 end the following:

“14. Protection of Original Designs ..... 1401”.

5 (b) JURISDICTION OF DISTRICT COURTS OVER DE-  
6 SIGN ACTIONS.—(1) Section 1338(c) of title 28, United  
7 States Code, is amended by inserting “, and to exclusive  
8 rights in designs under chapter 14 of title 17,” after “title  
9 17”.

10 (2)(A) The section heading for section 1338 of title  
11 28, United States Code, is amended by inserting “**de-**  
12 **signs,**” after “**mask works,**”.

13 (B) The item relating to section 1338 in the table  
14 of sections at the beginning of chapter 85 of title 28,  
15 United States Code, is amended by inserting “designs,”  
16 after “mask works,”.

17 (c) PLACE FOR BRINGING DESIGN ACTIONS.—Sec-  
18 tion 1400(a) of title 28, United States Code, is amended  
19 by inserting “or designs” after “mask works”.

20 (d) ACTIONS AGAINST THE UNITED STATES.—Sec-  
21 tion 1498(e) of title 28, United States Code, is amended  
22 by inserting “, and to exclusive rights in designs under  
23 chapter 14 of title 17,” after “title 17”.

1 **SEC. 604. EFFECTIVE DATE.**

2       The amendments made by sections 602 and 603 shall  
3 take effect one year after the date of the enactment of  
4 this Act.

      Passed the House of Representatives August 4,  
1998.

Attest:

ROBIN H. CARLE,  
*Clerk.*