

109<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 4536

To amend title 17, United States Code, to safeguard the rights and expectations of consumers who lawfully obtain digital entertainment.

---

## IN THE HOUSE OF REPRESENTATIVES

DECEMBER 14, 2005

Ms. ZOE LOFGREN of California (for herself, Mr. BOUCHER, and Mr. DOOLITTLE) introduced the following bill; which was referred to the Committee on the Judiciary

---

## A BILL

To amend title 17, United States Code, to safeguard the rights and expectations of consumers who lawfully obtain digital entertainment.

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

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Benefit Authors with-  
5 out Limiting Advancement or Net Consumer Expectations  
6 (BALANCE) Act of 2005”.

7 **SEC. 2. FINDINGS.**

8 The Congress makes the following findings:

1           (1) The law of copyright is often described as  
2 a “difficult balance between the interests of authors  
3 . . . in the control and exploitation of their writings  
4 . . . on the one hand, and society’s competing inter-  
5 est in the free flow of ideas, information, and com-  
6 merce on the other hand.” *Sony Corp. v. Universal*  
7 *City Studios, Inc.*, 464 U.S. 417, 429 (1984).

8           (2) Copyright seeks to encourage and reward  
9 creative efforts by securing a fair return for an au-  
10 thor’s labor. *Twentieth Century Music Corp. v.*  
11 *Aiken*, 422 U.S. 151, 156 (1975). At the same time,  
12 “[f]rom the infancy of copyright protection, some  
13 opportunity for fair use of copyrighted materials has  
14 been thought necessary to fulfill copyright’s very  
15 purpose, ‘[t]o promote the Progress of Science and  
16 useful Arts . . .’” *Campbell v. Acuff-Rose Music,*  
17 *Inc.*, 510 U.S. 569, 575 (1994).

18           (3) “[P]rivate motivation must ultimately serve  
19 the cause of promoting broad public availability of  
20 literature, music, and the other arts . . . When tech-  
21 nological change has rendered its literal terms am-  
22 biguous, the Copyright Act must be construed in  
23 light of this basic purpose.” *Twentieth Century*  
24 *Music Corp.*, 422 U.S. at 156.

1           (4) Advances in technology have often prompted  
2 changes to the copyright laws to maintain the bal-  
3 ance. For example, the development of player pianos  
4 preceded the enactment of the Copyright Act of  
5 1909. The development of cable television prompted  
6 complex reforms to section 111 of title 17, United  
7 States Code. *Sony*, 464 U.S. at 430–31.

8           (5) The development of digital technology and  
9 the rise of the Internet have once again altered the  
10 balance. On the one hand, digital technology threat-  
11 ens the rights of copyright holders. Perfect digital  
12 copies of songs and movies can be publicly trans-  
13 mitted, without authorization, to thousands of people  
14 at little or no cost. On the other hand, technological  
15 control measures give copyright holders the capacity  
16 to limit nonpublic performances and threaten soci-  
17 ety’s interests in the free flow of ideas, information,  
18 and commerce.

19           (6) The Digital Millennium Copyright Act  
20 (“DMCA”) was enacted as an attempt to safeguard  
21 the traditional balance in the face of these new chal-  
22 lenges. It gave copyright holders the ability to fight  
23 digital piracy by employing technical restrictions  
24 that prevent unlawful access and copying. In prac-

1 tice, however, the DMCA also endangered the rights  
2 and expectations of legitimate consumers.

3 (7) Contrary to the intent of Congress, section  
4 1201 of title 17, United States Code, has been inter-  
5 preted to prohibit all users—even lawful ones—from  
6 circumventing technical restrictions for any reason.  
7 As a result, the lawful consumer cannot legally cir-  
8 cumvent technological restrictions, even if he or she  
9 is simply trying to exercise a fair use or to utilize  
10 the work on a different digital media device. See,  
11 e.g., *Universal City Studios, Inc. v. Reimerdes*, 111  
12 F. Supp. 2d 294, 321–24 (S.D.N.Y. 2000) (DMCA  
13 failed to give consumers the technical means to  
14 make fair uses of encrypted copyrighted works).

15 (8) The authors of the DMCA never intended  
16 to create such a dramatic shift in the balance. As  
17 the report of the Committee of the Judiciary of the  
18 House of Representatives accompanying the DMCA  
19 stated: “[A]n individual [should] not be able to cir-  
20 cumvent in order to gain unauthorized access to a  
21 work, but [should] be able to do so in order to make  
22 fair use of a work which he or she has acquired law-  
23 fully.” House Report 105–551, Part I, Section-by-  
24 Section Analysis of section 1201(a)(1).

1           (9) It is now necessary to restore the traditional  
2           balance between copyright holders and society, as in-  
3           tended by the 105th Congress. Copyright laws in the  
4           digital age must prevent and punish digital pirates  
5           without treating every consumer as one.

6   **SEC. 3. PROTECTING FAIR USE AND CONSUMER EXPECTA-**  
7                                   **TIONS IN THE DIGITAL WORLD.**

8           (a) FAIR USE.—The first sentence of section 107 of  
9           title 17, United States Code, is amended by inserting after  
10          “or by any other means specified in that section,” the fol-  
11          lowing: “including by analog or digital transmissions,”.

12          (b) PERMISSIBLE USES OF DIGITAL WORKS.—

13                  (1) IN GENERAL.—Chapter 1 of title 17, United  
14          States Code, is amended by adding after section 122  
15          the following:

16   **“§ 123. Limitations on exclusive rights; permissible**  
17                                   **uses of digital works**

18          “(a) USE OF LAWFULLY OBTAINED DIGITAL  
19          WORKS.—Notwithstanding the provisions of section 106,  
20          it is not an infringement of copyright for a person who  
21          lawfully obtains a copy or phonorecord of a digital work,  
22          or who lawfully receives a transmission of a digital work,  
23          to reproduce, store, adapt, or access the digital work—

24                  “(1) for archival purposes, if all such archival  
25          copies are destroyed or rendered permanently inac-

1       cessible in the event that continued possession of the  
2       work should cease to be rightful; and

3               “(2) in order to perform or display the work, or  
4       an adaptation of the work, on a digital media device,  
5       if the work is not so performed or displayed publicly.

6       “(b) EFFECT OF LICENSES.—When a digital work is  
7       distributed to the public subject to nonnegotiable license  
8       terms, such terms shall not be enforceable under the com-  
9       mon laws or statutes of any State to the extent that they  
10      restrict or limit any of the limitations on exclusive rights  
11      under this title.

12      “(c) DEFINITIONS.—As used in this section, the fol-  
13      lowing terms have the following meanings:

14              “(1) A ‘digital work’ is any literary work (ex-  
15      cept a computer program), sound recording, musical  
16      work, dramatic work, or motion picture or other  
17      audiovisual work, in whole or in part in a digital or  
18      other nonanalog format.

19              “(2) A ‘digital media device’ is any hardware or  
20      software that converts copyrighted works in digital  
21      form into a format whereby the images and sounds  
22      are visible or audible, or retrieves or accesses copy-  
23      righted works in digital format and transfers or  
24      makes available for transfer such works to such  
25      hardware or software.

1       “(d) CONSTRUCTION.—Nothing in this section shall  
2 enlarge or diminish any of the other limitations on exclu-  
3 sive rights contained in this title, including any limitations  
4 that relate to archival activities by a library or an archives  
5 under sections 107 and 108.”.

6           (2) CONFORMING AMENDMENT.—The table of  
7 sections for chapter 1 of title 17, United States  
8 Code, is amended by adding at the end the following  
9 new item:

“123. Limitations on exclusive rights; Permissible uses of digital works.”.

10 **SEC. 4. DIGITAL FIRST SALE.**

11       Section 109 of title 17, United States Code, is  
12 amended by adding at the end the following:

13       “(f) The privileges prescribed by subsections (a) and  
14 (c) apply in a case in which the owner of a particular copy  
15 or phonorecord of a work in a digital or other nonanalog  
16 format, or any person authorized by such owner, sells or  
17 otherwise disposes of the work by means of a transmission  
18 to a single recipient, if the owner does not retain the copy  
19 or phonorecord in a retrievable form and the work is so  
20 sold or otherwise disposed of in its original format.”.

21 **SEC. 5. PERMISSIBLE CIRCUMVENTION TO ENABLE FAIR**  
22 **USE AND CONSUMER EXPECTATIONS.**

23       Section 1201 of title 17, United States Code, is  
24 amended—

1           (1) by redesignating subsections (c) through (k)  
2           as subsections (d) through (l), respectively; and

3           (2) by inserting after subsection (b) the fol-  
4           lowing:

5           “(c) CIRCUMVENTION FOR NONINFRINGEMENT USES.—

6           (1) Notwithstanding any other provision in this title, a  
7           person who lawfully obtains a copy or phonorecord of a  
8           work, or who lawfully receives a transmission of a work,  
9           may circumvent a technological measure that effectively  
10          controls access to the work or protects a right of the copy-  
11          right holder under this title if—

12           “(A) such act is necessary to make a non-  
13          infringing use of the work under this title; and

14           “(B) the copyright owner fails to make publicly  
15          available the necessary means to make such non-  
16          infringing use without additional cost or burden to  
17          such person.

18          “(2) Notwithstanding the provisions of subsections  
19          (a)(2) and (b), any person may manufacture, import, offer  
20          to the public, provide, or otherwise make available techno-  
21          logical means to circumvent a technological measure that  
22          effectively controls access to a work protected under this  
23          title or protects a right of a copyright holder under this  
24          title, if—



1           “(A) such means are necessary to make a non-  
2           infringing use under paragraph (1)(A);

3           “(B) such means are designed, produced, and  
4           marketed to make a noninfringing use under para-  
5           graph (1)(A); and

6           “(C) the copyright owner fails to make available  
7           the necessary means referred to in paragraph  
8           (1)(B).”.

○