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## Senate

(Legislative day of Friday, October 2, 1998)

### DIGITAL MILLENNIUM COPYRIGHT ACT—CONFERENCE REPORT

Mr. HATCH. Mr. President, I submit a report of the committee of conference on the bill (H.R. 2281) amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performance and Phonograms Treaty, and for other purposes, and ask for its immediate consideration.

The PRESIDING OFFICER. The report will be stated.

The assistant legislative clerk read as follows:

The committee on conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 2281), have agreed to recommend and do recommend to their respective Houses this report, signed by all of the conferees.

The PRESIDING OFFICER. Without objection, the Senate will proceed to the consideration of the conference report.

(The conference report is printed in the House proceedings of the RECORD of October 8, 1998.)

Mr. KOHL. Mr. President, I rise to express my support for the Conference Report on the Digital Millennium Copyright Act (H.R. 2281). In my view, we need this measure to stop an epidemic of illegal copying of protected works—such as movies, books, musical recordings, and software—and to limit, in a balanced and thoughtful way, the infringement liability of online service providers. The copyright industry is one of our most thriving businesses. But we still lose more than \$15 billion each year due to foreign copyright piracy, according to some estimates.

And foreign piracy is just out of control. For example, one of my staffers investigating video piracy on a trip to China walked into a Hong Kong arcade and bought three bootlegged computer games—including “Toy Story” and

“NBA ’97”—for just \$10. These games, combined, normally sell for about \$100. Indeed, the manager was so brazen about it, he even agreed to give out a receipt.

Illegal copying has been a longstanding concern to me. I introduced one of the precursors to this bill, the Motion Picture Anti-Piracy Act (in the 101st Congress), which in principle has been incorporated into this measure. And I was one of the cosponsors of the original proposed WIPO implementing legislation, the preliminary version of this proposal.

In my opinion, this bill achieves a fair balance by taking steps to effectively deter piracy, while still allowing fair use of protected materials. It is the product of intensive negotiations between all of the interested parties—including the copyright industry, telephone companies, libraries, universities and device manufacturers. And virtually every major concern raised during that process was addressed.

Unfortunately, however, the Conference dropped what I believe were crucial protections for databases. It is my understanding, though, that the Committee will be “fast tracking” consideration of database protection next Congress. I look forward to working with Chairman HATCH to move forward on this matter early next year.

In sum, Mr. President, I am confident that this bill will reduce piracy and strengthen one of our biggest export industries. It deserves our support and the President’s signature.

Mr. ASHCROFT. Mr. President, I rise in support of the conference report on H.R. 2281, a bill to implement the World Intellectual Property Organization copyright treaties. I am pleased that the final product of the many months of negotiations has produced a bill of appropriate scope and balance, and reflects many of the priorities I es-

tablished through the introduction of my own bill to implement the WIPO copyright treaties, to begin updating the Copyright Act for the digital era, and to address the potential problem of on-line servicer liability.

First, with respect to “fair use,” the conferees adopted an alternative to section 1201(a)(1) that would authorize the Librarian of Congress to selectively waive the prohibition against the act of circumvention to prevent a diminution in the availability to individual users (including institutions) of a particular category of copyrighted materials. As originally proposed by the Administration and adopted by the Senate, this section would have established a flat prohibition on the circumvention of technological protection measures to gain access to works for any purpose, and thus raised the specter of moving our Nation towards a “pay-per-use” society. Under the compromise embodied in the conference report, the Librarian of Congress would have authority to address the concerns of libraries, educational institutions, and other information consumers potentially threatened with a denial of access to categories of works in circumstances that otherwise would be lawful today. I trust that the Librarian of Congress will implement this provision in a way that will ensure information consumers may exercise their centuries-old fair use privilege to continue to gain access to copyrighted works.

Second, the conferees made an important contribution by clarifying the “no mandate” provision of the bill. Because the conference report is silent, I thought that I should explain this provision in some detail. As my colleagues may recall, I had been very concerned that S. 2037 could be interpreted as a mandate on product manufacturers to design products so as to affirmatively

• This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.



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respond to or accommodate technological protection measures that copyright owners might use to deny access to or the copying of their works. To address this potential problem, I authored an amendment providing that nothing in the bill required that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological protection measure. The amendment reflected my belief that product manufacturers should remain free to design and produce the best, most advanced consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Creative engineers—not risk-averse lawyers—should be principally responsible for product design. As important, the amendment reflected the working assumption of all of my colleagues that this bill is aimed fundamentally at so-called “black boxes” and not at legitimate products that have substantial noninfringing uses.

As my colleagues know, there had been some concern expressed that the “so long as” clause of section 1201(c)(3) made the provision appear to be circular in its logic. In other words, there was concern that the entire provision could be read to provide in essence that manufacturers were not under any design mandate to respond to technological measures, as long as they “otherwise” designed their devices to respond to existing technological measures. I never shared that perspective. To eliminate any uncertainty, the House Commerce Committee simply deleted the “so long as” clause. As I explained on the floor in September, that change merely confirmed my original conception of the amendment. Now that the conferees have adopted a provision requiring certain analog videocassette recorders to respond to certain existing analog protection measures, the “so long as” clause has a meaning that all should agree is logical: Manufacturers of consumer electronics, telecommunications, and computer products are not under a design mandate generally, but they are otherwise subject to a single, very limited, and carefully defined mandate to design certain analog videocassette recorders to respond to existing analog protection measures. Quite importantly from my perspective, this provision is limited so as not to impair the reasonable and accustomed home taping practices of consumers recognized in the Supreme Court’s *Betamax* decision.

It thus should be about as clear as can be to a judge or jury that, unless otherwise specified, nothing in this legislation should be interpreted to limit manufacturers of legitimate products with substantial noninfringing uses—such as VCRs and personal computers—in making fundamental design decision or revisions, whether in selecting cer-

tain components over others or in choosing particular combinations of parts.

Third, I am pleased to see that the conferees have addressed the device “playability” problem. As I pointed out in my floor speech just prior to final passage of S. 2037, “playability” problems may arise at two levels. Technological measures may cause noticeable and recurring adverse effects on the normal operation of products, and thus adjustments may be necessary at the factory levels to ensure consumers get what they expect. In addition, adjustments to specific products may be necessary after sale to a consumer to maintain their normal, authorized functioning. Subsequently, I was pleased to see that the Commerce Committee’s report explicitly reaffirmed my interpretation.

I also was pleased that the conferees shared my perspective on encouraging all interested parties to strive to work together through a consultative approach before new technological measures are introduced in the market. As the conferees pointed out, one of the benefits of such consultations is to allow the testing of proposed technologies to determine whether they create playability problems, and to have an opportunity to take steps to eliminate or substantially mitigate such adverse effects before new technologies are introduced. As the conferees recognized, however, persons may choose to implement a new technological measure (or copyright management information system) without vetting it through an inter-industry consultative process, or without regard to the input of the affected parties.

Whether introduced unilaterally or developed with the input of experts in the field, a new protection technology coming to market might materially degrade or otherwise cause recurring appreciable adverse effects on the authorized performance or display of works. Given the multiplicity of ways in which devices might be interconnected, some playability problems may not be foreseeable. I was thus pleased that the conference report unambiguously provides that manufacturers and persons servicing popular consumer electronics, telecommunications, or computing products who make product adjustments solely to mitigate a playability problem—whether or not taken in combination with other lawful product modifications—shall not be deemed to have violated either section 1201(a) or section 1201(b). Having heard directly from a major trade association representing professional servicers, I am pleased we could include such strong language so that they can go about their business without fear of facing crippling liability.

Fourth, the conferees adopted specific provisions making it clear that the bill is not intended to prohibit legitimate encryption research or security systems testing. As my colleagues know, Senators BURNS, LEAHY, and I

have lead the effort in the Senate to ensure that U.S. business can develop and export world-class encryption products, by explicitly fashioning an affirmative encryption research defense, the conferees made an important contribution to our overall efforts to ensure that U.S. industry remains at the forefront in developing secure encryption methods. In addition, by including a security system testing amendment, the conferees have confirmed that professional consultants and other well-established, responsible corporate citizens can survey and test IT security systems for vulnerabilities.

Finally, the conferees built on my efforts to ensure that this legislation would not harm the efforts of consumers to protect their personal privacy by including two important amendments proposed by the House Commerce Committee. The first amendment would create incentives for website operators to disclose whenever they use technological measures that have the capability to gather personal data, and to give consumers a means of disabling them. The second amendment strengthened section 1202 of this legislation by making explicit that the term “copyright management information” does not include “any personally identifying information about a user of a work or a copy, phonorecord, performance, or display of a work.” In my view, these amendments will help preserve the critical balance that we must maintain between the interests of copyright owners and the privacy interests of information users.

We should all be gratified that so much has been done to appropriately calibrate the WIPO copyright treaties implementing legislation. Each of us, working alone, would undoubtedly have produced a different bill. But we have a good bill, perhaps one more balanced and limited in scope than might have been thought possible at times throughout the debate. I therefore urge my colleagues to vote in favor of the conference report.

Mr. THURMOND. Mr. President, I wish to express my strong support for the Conference Report to the Digital Millennium Copyright Act. As one of the conferees, I believe this bill represents a fair compromise between the House and Senate versions of this most significant legislation.

Intellectual property is an increasingly important part of the American economy. This bill recognizes the significance of our copyright laws as America and the world have become increasingly computerized. The Internet is rapidly changing our lives, and our copyright laws must keep pace.

This legislation implements the WIPO treaties to help protect the property rights of the creative community in our global environment. It also clarifies the liability of on-line and Internet service providers regarding their liability for copyright infringement and permits fair use of works. Together, these provisions do a great deal