

a view generally shared by the conferees—that product manufacturers should remain free to design and produce consumer electronics, telecommunications, and computing products without the threat of incurring liability for their design decisions. Imposing design requirements on product and component manufacturers would have a dampening effect on innovation, on the research and development of new products, and hence on the growth of electronic commerce.

The Committee on Commerce recognized that it is important to balance the interest in protecting copyrighted works through the use of technological measures with the interest in allowing manufacturers to design their products to respond to consumer needs and desires. Had the bill been read to require that products respond to any technological protection measure that any copyright owner chose to deploy, manufacturers would have been confronted with difficult, perhaps even impossible, design choices, with the result that the availability of new products with new product features could have been restricted. They might have been forced to choose, for example, between implementing two mutually incompatible technological measures. In striking a balance between the interests of product manufacturers and content owners, the Committee believed that it was inappropriate and technologically infeasible to require products to respond to all technological protection measures. For that reason, it included the “no mandate” provision in the form of section 1201(c)(3). As a result of this change, it was the Committee’s strongly held view that the bill should not serve as a basis for attacking the manufacture, importation, or sale of staple articles of commerce with commercially significant non-infringing uses, but it would provide content owners with a powerful new tool to attack black boxes. Except for the one recognition in the conference report of the balanced requirements of section 1201(k) as “otherwise” imposing certain obligations, this provision remains unchanged from the House bill.

Based on prior experience and the extensive hearing record, the Committee also was concerned that new technological measures and systems for preserving copyright management information might cause “playability” problems. For example, the Committee learned that, as initially proposed, a proprietary copy protection scheme that is today widely used to protect analog motion pictures could have caused significant viewability problems, including noticeable artifacts, with certain television sets until it was modified with the cooperation of the consumer electronics industry. Concerns were expressed that H.R. 2281 could be interpreted to require consumer electronics manufacturers to design their devices not only so that they would have to respond to such similarly flawed schemes, but also that they, and others, would be prevented by the proscriptions in the bill from taking necessary steps to fix such problems.

As advances in technology occur, consumers will enjoy additional benefits if devices are able to interact, and share information. Achieving interoperability in the consumer electronics environment will be a critical factor in the growth of electronic commerce. Companies are already designing operating systems and networks that connect devices in the home and workplace. In the Committee’s view, manufacturers, consumers, retailers, and profes-

sional servicers should not be prevented from correcting an interoperability problem or other adverse effect resulting from a technological measure causing one or more devices in the home or in a business to fail to interoperate with other technologies. Given the multiplicity of ways in which products will interoperate, it seems probable that some technological measures or copyright management information systems might cause playability problems.

To encourage the affected industries to work together with the goal of avoiding potential playability problems in advance to the extent possible, the Committee emphasized in its report and I made clear in my floor statement that a manufacturer of a product or device (to which 1201 would otherwise apply) may lawfully design or modify the product or device to the extent necessary to mitigate a frequently occurring and noticeable adverse effect on the authorized performance or display of a work that is caused by a technological measure in the ordinary course of its design and operation. Similarly, recognizing that a technological measure may cause a playability problem with a particular device, or combination of devices, used by a consumer, the Committee also emphasized that a retailer, professional servicer, or individual consumer lawfully could modify a product or device solely to the extent necessary to mitigate a playability problem caused by a technological measure in the ordinary course of its design and operation. The conferees made clear in their report that they shared these views on playability.

In this connection, the Committee on Commerce emphasized its hope that the affected industries would work together to avoid such playability problems to the extent possible. We know that multi-industry efforts to develop copy control technologies that are both effective and avoid such noticeable and recurring adverse effects have been underway over the past two years. The Committee strongly encouraged the continuation of those efforts, which it views as offering substantial benefits to copyright owners in whose interest it is to achieve the introduction of effective technological protection measures and, where appropriate, copyright management information technologies that do not interfere with the normal operations of affected products.

I was particularly pleased that the Senate conferees shared our Committee’s assessment of the importance of addressing the playability issue and of 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 consultation is to allow the testing of proposed technologies to determine whether they create playability problems on the ordinary performance of playback and display equipment, and to thus be able 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 technology without vetting it through an inter-industry consultative process, or without regard to the input of the affected parties. That would be unfortunate.

In any event, however a new protection technology or new copyright management information technology comes to market, the conferees recognized that the technology might materially degrade or otherwise cause

recurring appreciable adverse effects on the authorized performance or display of works. Thus, with our Committee’s encouragement, the conferees explicitly stated that makers or servicers of consumer electronics, telecommunications, or computing products who took steps 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). Without giving them that absolute assurance, we felt that the introduction of new products into the market might be stifled, or that consumers might find it more difficult to get popular legitimate products repaired.

I want to add, however, that we shared the concern of our fellow conferees that this construction was not meant to afford manufacturers or servicers an opportunity to give persons unauthorized access to protected content or to usurp the rights under the Copyright Act—not title 17 generally—of copyright owners in such works under the guise of “correcting” a playability problem. Nor was it our intent to give the unscrupulous *carte blanche* to convert legitimate products into black boxes under the guise of fixing an ostensible playability problem for a consumer.

Moreover, with respect copyright management information, the conferees also made it explicit that persons may make product adjustments to eliminate playability problems without incurring liability under section 1202 as long as they are not inducing, enabling, facilitating, or concealing usurpation of rights of copyright owners under the Copyright Act.

Section 1201(k) requires that certain analog recording devices respond to two forms of copy control technology that are in wide use in the market today. Neither employees encryption or scrambling of the content being protected, but they have been subject to extensive multi-industry consultations, testing, and analysis. With respect to this provision, I think it is important to stress four points. First, these analog-based technologies do not create “playability” problems on normal consumer electronics products. Second, the intellectual property necessary for the operation of these technologies will be available on reasonable and non-discriminatory terms. Third, we specifically excluded from the scope of the provision professional analog videocassette recorders, which the motion picture, broadcasting, and other legitimate industries and individual businesses use today in, and will continue to need for, their normal, lawful business operations. And finally, and most importantly, we have established very definitive “encoding rules” to ensure that we have preserved longstanding and well-established consumer home taping practices.

As Chairman of the Committee on Commerce, which has jurisdiction over such communications matters as the distribution of free and subscription television programming, I think it is important to stress that the encoding rules represent a careful balancing of interests. Although copyright owners may use these technologies to prevent the making of a viewable copy of a pay-per-view, near video on demand, or video on demand transmission or prerecorded tape or disc containing a motion picture, they may not use such encoding to limit or preclude consumers from making analog copies of programming offered through other channels or services. Thus, in addition

to traditional over-the-air broadcasts, basic and extended tiers or programming services, whether provided through cable or other wireline, satellite, or future over-the-air terrestrial systems, may not be encoded with these technologies at all. In addition, copyright owners may only utilize these technologies to prevent the making of a "second generation" copy of an original transmission provided through a pay television service.

Given that copyright owners may not use these technologies to deprive consumers of their right to copy from pay television programming, the distinction between pay-per-view and pay television services is critical. Where a member of the public affirmatively selects a particular program or a specified group of programs and then pays a fee that is separate from subscription or other fees, the program offering is pay-per-view. Where, however, consumers subscribe to or pay for programming that the programmer selects, whether it be one or more discrete programs, or a month's worth of programming, then that package itself is a pay television service, even if it represents only a portion of the programming that might be available for purchase on the programmer's channel.

In short, with the conferees essentially having endorsed the approach of the Committee on Commerce to WIPO implementing legislation, we have produced a bill that should help spur creativity by content providers without stifling the growth of new technology. In fact, with a clear set of rules established for both analog and digital devices, product designers should enjoy the freedom to innovate and bring ever-more exciting new products to market.

I think we have struck fair and reasonable compromises, and have produced a bill of appropriate scope and balance. I urge my colleagues to support the conference report.

WHY THE JOINT COMMISSION ON ACCREDITING HEALTHCARE ORGANIZATIONS (JCAHO) MUST DO BETTER

HON. FORTNEY PETE STARK

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Tuesday, October 13, 1998

Mr. STARK. Mr. Speaker, we need to take immediate action to make JCAHO accountable to the public. The Administration's July 1, 1998 report on nursing home quality ["Private Accreditation (Deeming) of Nursing Homes, Regulatory Incentives, and Non-Regulatory Initiatives, and Effectiveness of the Survey and Certification System"] shows that the nation's premier, private health accrediting organization—the Joint Commission on Accrediting Healthcare Organizations needs to do a much better job of protecting Medicare patients and dollars. Before JCAHO extends its accrediting activities to other areas—such as hospice agencies where it is applying to be an accrediting organization—it needs to prove it can do its current job of inspecting nursing homes and hospitals.

As I said in my opening remarks to the Ways and Means Health Subcommittee on July 1, 1990, "Validating the JCAHO status is critical given that HCFA, through a process termed 'deemed Status' relies on JCAHO to

assure that most hospitals are providing quality health services to Medicare beneficiaries. If a hospital (or now other health care facility) is accredited by JCAHO, it is deemed to meet the Medicare conditions of participation." We found many problems eight years ago and many still continue, which would indicate a fundamental problem with JCAHO culture caused, I believe, by the system of financing JCAHO inspections. This is why I have introduced H.R. 800 to increase public access to and influence on JCAHO.

H.R. 800 will require that one-third of the members of the governing boards of Medicare-accrediting agencies are members of the public. JCAHO currently claims to have 6 public members on its board. In fact, a recent appointee to one of the scarce public seats, is also a director of the second-largest investor-owned hospital company. This recent appointment is just one example of the conflict of interest rampant in JCAHO's operating procedures. My bill also outlines a definition of "members of the public" to prevent similar appointments in the future.

On July 1, 1998, HCFA issued a Report to Congress entitled, "Study of Private Accreditation (Deeming) of Nursing Homes, Regulatory Incentives, and Effectiveness of the Survey and Certification System". This damning report detailed numerous deficiencies in JCAHO's current inspection system. To extend JCAHO's deeming to hospice care would permit an inadequate program greater authority.

JCAHO recently announced its intention to expand its scope of inspection to include hospice facilities. JCAHO currently surveys nursing homes, hospitals, and other health providers. But according to a recent HCFA/Abt study, JCAHO is unable to effectively administer surveys, identify problems, and implement problem correction policies. Allowing an organization riddled with problems further authority would be a terrible mistake.

JCAHO accredits health care facilities at the facilities' request. The federal government recognizes JCAHO hospital and home health agency accreditation as equivalent to meeting its Medicare Conditions of Participation.

According to the recent HCFA/Abt report to Congress, JCAHO has to make drastic changes to meet the basic Medicare requirements. JCAHO continues to deem facilities Medicare eligible, when in fact these facilities do not meet Medicare standards. Facilities that want to be accredited pay JCAHO to survey their site. Allowing JCAHO to accredit facilities that pay for surveys represent a conflict of interest. JCAHO's lack of objectivity plagues the current accreditation process.

Furthermore, JCAHO accreditation does not meet current Medicare guidelines for allowing facilities to participate in the program. The most serious allegation against JCAHO is that it overlooks regulatory infractions at the expense of patients for example: One nursing home administrator responded to questions about JCAHO's procedures with the following. "They (JCAHO) are big into policies and procedures * * * they are more interested in quality improvement and assessment than problem correction."¹

Lack of problem correction is of special concern given the nature of nursing home resi-

dents. This population is one of the most vulnerable parts of the health care population, with 48 percent of nursing home patients suffering from some form of dementia.

JCAHO is unable to effectively accredit private nursing homes, and thus should not be allowed to additionally accredit hospice facilities until its inspection system is improved. The results of empirical studies included in the Study demonstrate the need for overhaul of the current regulatory system.

While the Medicare system may benefit from reduced regulatory costs by using JCAHO, the savings do not outweigh the risk of severe deficiencies in care. Although deeming may save Medicare \$2 to \$37 million a year by private accreditation, JCAHO surveyors often miss serious deficiencies, which in some cases may even result in unjustified deaths. We must not sacrifice the welfare of the most vulnerable for minimal financial gains.

JCAHO does not effectively administrate regulatory surveys. The timing of JCAHO surveys was easy for nursing home administrators to predict. Surveys were never conducted at night or on the weekends. Thus once a provider paid JCAHO to accredit the facility they could hypothetically increase staff levels on only Monday and Tuesday day shifts in anticipation of a pending survey.

Furthermore, the current system fails miserably to identify problems. The incidence of serious deficiencies found decreased with the implementation of the new accreditation program. The new process may also tend to identify deficiencies as less serious than they actually are.

Flaws in the problem identification system are evidenced by the fact that simultaneous public accreditation found more serious deficiencies than JCAHO did. More importantly, the current system under-addresses malnutrition and violence problems. Currently nursing home aides are not required to undergo criminal background checks. Furthermore some employers seek out recent parolees knowing that these employees will work for a lower salary. JCAHO fails to detect inadequate and even fraudulent staff training practices: Frequently reported actions to provide in-staff training to staff result in no evidence on quality and content. Very high staff turnover suggests that the staff is not benefitting from the required training. In one case, workers were asked to sign an attendance sheet for an in-staff training session they never attended.²

HCFA standards are generally more stringent than JCAHO standards. JCAHO surveyors seem to miss serious deficiencies that HCFA surveyors frequently identify. JCAHO standards are heavily weighted toward structure and process measures, while HCFA standards have a more resident-centered and outcome-oriented focus.

The JCAHO accreditation and HCFA validation inspections differed widely in their approach as well. JCAHO surveyors spent little time assessing quality of life issues or observing clinical treatments. JCAHO surveyors also spent little time observing clinical care or with residents, and those residents who JCAHO surveyors did interview were often pre-selected by nursing home staff.³

In the Report to Congress HCFA said that JCAHO lacked the ability to enforce findings

¹Pp. 617-618 "Study of Private Accreditation (Deeming) of Nursing Homes, Regulatory Incentives and Non-Regulatory Initiatives, and Effectiveness of the Survey and Certification", Health Care Financing Administration, July 1, 1998.

²Pg. xii, Executive Summary; Study: HCFA

³Pg. 18, Vol. I Study: Health Care Financing Administration