

105TH CONGRESS  
2D SESSION

# S. 2037

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## AN ACT

To amend title 17, United States Code, to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, to provide limitations on copyright liability relating to material online, 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,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Digital Millennium  
5 Copyright Act of 1998”.

1 **SEC. 2. TABLE OF CONTENTS.**

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

TITLE I—WIPO TREATIES IMPLEMENTATION

Sec. 101. Short title.  
Sec. 102. Technical amendments.  
Sec. 103. Copyright protection systems and copyright management information.  
Sec. 104. Conforming amendment.  
Sec. 105. Effective date.

TITLE II—INTERNET COPYRIGHT INFRINGEMENT LIABILITY

Sec. 201. Short title.  
Sec. 202. Limitations on liability for Internet copyright infringement.  
Sec. 203. Conforming amendment.  
Sec. 204. Liability of educational institutions for online infringement of copy-  
right.  
Sec. 205. Effective date.

TITLE III—COMPUTER MAINTENANCE OR REPAIR

Sec. 301. Limitation on exclusive rights; computer programs.

TITLE IV—EPHEMERAL RECORDINGS; DISTANCE EDUCATION;  
EXEMPTION FOR LIBRARIES AND ARCHIVES

Sec. 401. Ephemeral recordings.  
Sec. 402. Limitations on exclusive rights; distance education.  
Sec. 403. Exemption for libraries and archives.

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

4 **SEC. 101. SHORT TITLE.**

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

8 **SEC. 102. TECHNICAL AMENDMENTS.**

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

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

1           (2) in the definition of “The ‘country of origin’  
2 of a Berne Convention work”, by deleting “The  
3 ‘country of origin’ of a Berne Convention work,”,  
4 capitalizing the first letter of the word “for”, delet-  
5 ing “is the United States” after “For purposes of  
6 section 411,”, and inserting “a work is a ‘United  
7 States work’ only” after “For purposes of section  
8 411,”;

9           (3) in paragraph (1)(B) of the definition of  
10 “The ‘country of origin’ of a Berne Convention  
11 work”, by inserting “treaty party or parties” and  
12 deleting “nation or nations adhering to the Berne  
13 Convention”;

14           (4) in paragraph (1)(C) of the definition of  
15 “The ‘country of origin’ of a Berne Convention  
16 work”, by inserting “is not a treaty party” and de-  
17 leting “does not adhere to the Berne Convention”;

18           (5) in paragraph (1)(D) of the definition of  
19 “The ‘country of origin’ of a Berne Convention  
20 work”, by inserting “is not a treaty party” and de-  
21 leting “does not adhere to the Berne Convention”;

22           (6) in paragraph (3) of the definition of “The  
23 ‘country of origin’ of a Berne Convention work”, by  
24 deleting “For the purposes of section 411, the ‘coun-

1 try of origin’ of any other Berne Convention work is  
2 not the United States.”;

3 (7) after the definition for “fixed”, by inserting  
4 “The ‘Geneva Phonograms Convention’ is the Con-  
5 vention for the Protection of Producers of  
6 Phonograms Against Unauthorized Duplication of  
7 Their Phonograms, concluded at Geneva, Switzer-  
8 land on October 29, 1971.”;

9 (8) after the definition for “including”, by in-  
10 sserting “An ‘international agreement’ is—

11 “(1) the Universal Copyright Convention;

12 “(2) the Geneva Phonograms Convention;

13 “(3) the Berne Convention;

14 “(4) the WTO Agreement;

15 “(5) the WIPO Copyright Treaty;

16 “(6) the WIPO Performances and Phonograms  
17 Treaty; and

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

20 (9) after the definition for “transmit”, by in-  
21 sserting “A ‘treaty party’ is a country or intergovern-  
22 mental organization other than the United States  
23 that is a party to an international agreement.”;

24 (10) after the definition for “widow”, by insert-  
25 ing “The ‘WIPO Copyright Treaty’ is the WIPO

1 Copyright Treaty concluded at Geneva, Switzerland,  
2 on December 20, 1996.”;

3 (11) after the definition for “The ‘WIPO Copy-  
4 right Treaty’, by inserting “The ‘WIPO Perform-  
5 ances and Phonograms Treaty’ is the WIPO Per-  
6 formances and Phonograms Treaty concluded at Ge-  
7 neva, Switzerland on December 20, 1996.”; and

8 (12) by inserting, after the definition for “work  
9 for hire”, “The ‘WTO Agreement’ is the Agreement  
10 Establishing the World Trade Organization entered  
11 into on April 15, 1994. The terms ‘WTO Agree-  
12 ment’ and ‘WTO member country’ have the mean-  
13 ings given those terms in paragraphs (9) and (10)  
14 respectively of section 2 of the Uruguay Round  
15 Agreements Act.”.

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

18 (1) in subsection (b)(1), by deleting “foreign  
19 nation that is a party to a copyright treaty to which  
20 the United States is also a party” and inserting  
21 “treaty party”;

22 (2) in subsection (b)(2) by deleting “party to  
23 the Universal Copyright Convention” and inserting  
24 “treaty party”;

1           (3) by renumbering the present subsection  
2           (b)(3) as (b)(5) and moving it to its proper sequen-  
3           tial location and inserting a new subsection (b)(3) to  
4           read:

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

7           (4) in subsection (b)(4) by deleting “Berne  
8           Convention work” and inserting “pictorial, graphic  
9           or sculptural work that is incorporated in a building  
10          or other structure, or an architectural work that is  
11          embodied in a building and the building or structure  
12          is located in the United States or a treaty party”;

13          (5) by renumbering present subsection (b)(5) as  
14          (b)(6);

15          (6) by inserting a new subsection (b)(7) to  
16          read:

17          “(7) for purposes of paragraph (2), a work that  
18          is published in the United States or a treaty party  
19          within thirty days of publication in a foreign nation  
20          that is not a treaty party shall be considered first  
21          published in the United States or such treaty party  
22          as the case may be.”; and

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

24          “(d) EFFECT OF PHONOGRAMS TREATIES.—Not-  
25          withstanding the provisions of subsection (b), no works

1 other than sound recordings shall be eligible for protection  
2 under this title solely by virtue of the adherence of the  
3 United States to the Geneva Phonograms Convention or  
4 the WIPO Performances and Phonograms Treaty.”.

5 (c) Section 104A(h) of title 17, United States Code,  
6 is amended—

7 (1) in paragraph (1), by deleting “(A) a nation  
8 adhering to the Berne Convention or a WTO mem-  
9 ber country; or (B) subject to a Presidential procla-  
10 mation under subsection (g),” and inserting—

11 “(A) a nation adhering to the Berne Con-  
12 vention;

13 “(B) a WTO member country;

14 “(C) a nation adhering to the WIPO Copy-  
15 right Treaty;

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

18 “(E) subject to a Presidential proclamation  
19 under subsection (g)”;

20 (2) paragraph (3) is amended to read as fol-  
21 lows:

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

1           “(A) becomes a WTO member country  
2 after the date of enactment of the Uruguay  
3 Round Agreements Act;

4           “(B) on the date of enactment is, or after  
5 the date of enactment becomes, a nation adher-  
6 ing to the Berne Convention;

7           “(C) adheres to the WIPO Copyright  
8 Treaty;

9           “(D) adheres to the WIPO Performances  
10 and Phonograms Treaty; or

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

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

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

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

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

1           (6) in paragraph (8)(B)(i), by inserting “of  
2           which” before “the majority” and striking “of eligi-  
3           ble countries”; and

4           (7) by deleting paragraph (9).

5           (d) Section 411 of title 17, United States Code, is  
6 amended—

7           (1) in subsection (a), by deleting “actions for  
8           infringement of copyright in Berne Convention  
9           works whose country of origin is not the United  
10          States and”; and

11          (2) in subsection (a), by inserting “United  
12          States” after “no action for infringement of the  
13          copyright in any”.

14          (e) Section 507(a) of title 17, United States Code,  
15 is amended by adding at the beginning, “Except as ex-  
16 pressly provided elsewhere in this title,”.

17 **SEC. 103. COPYRIGHT PROTECTION SYSTEMS AND COPY-**  
18 **RIGHT MANAGEMENT INFORMATION.**

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

21 **“CHAPTER 12—COPYRIGHT PROTECTION AND**  
22 **MANAGEMENT SYSTEMS**

“Sec.

“1201. Circumvention of copyright protection systems.

“1202. Integrity of copyright management information.

“1203. Civil remedies.

“1204. Criminal offenses and penalties.

“1205. Savings Clause.

1 **“§ 1201. Circumvention of copyright protection sys-**  
2 **tems**

3 “(a) VIOLATIONS REGARDING CIRCUMVENTION OF  
4 TECHNOLOGICAL PROTECTION MEASURES.—(1) No per-  
5 son shall circumvent a technological protection measure  
6 that effectively controls access to a work protected under  
7 this title.

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

11 “(A) is primarily designed or produced for the  
12 purpose of circumventing a technological protection  
13 measure that effectively controls access to a work  
14 protected under this title;

15 “(B) has only limited commercially significant  
16 purpose or use other than to circumvent a techno-  
17 logical protection measure that effectively controls  
18 access to a work protected under this title; 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 a technological  
22 protection measure that effectively controls access to  
23 a work protected under this title.

24 “(3) As used in this subsection—

25 “(A) to ‘circumvent a technological protection  
26 measure’ means to descramble a scrambled work, to

1 decrypt an encrypted work, or otherwise to avoid,  
2 bypass, remove, deactivate, or impair a technological  
3 protection measure, without the authority of the  
4 copyright owner; and

5 “(B) a technological protection measure ‘effec-  
6 tively controls access to a work’ if the measure, in  
7 the ordinary course of its operation, requires the ap-  
8 plication of information, or a process or a treatment,  
9 with the authority of the copyright owner, to gain  
10 access to the work.

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

15 “(A) is primarily designed or produced for the  
16 purpose of circumventing protection afforded by a  
17 technological protection measure that effectively pro-  
18 tects a right of a copyright owner under this title in  
19 a work or a portion thereof;

20 “(B) has only limited commercially significant  
21 purpose or use other than to circumvent protection  
22 afforded by a technological protection measure that  
23 effectively protects a right of a copyright owner  
24 under this title in a work or a portion thereof; or

1           “(C) is marketed by that person or another act-  
2           ing in concert with that person with that person’s  
3           knowledge for use in circumventing protection af-  
4           forded by a technological protection measure that ef-  
5           fectively protects a right of a copyright owner under  
6           this title in a work or a portion thereof.

7           “(2) As used in this subsection—

8           “(A) to ‘circumvent protection afforded by a  
9           technological protection measure’ means avoiding,  
10          bypassing, removing, deactivating, or otherwise im-  
11          pairing a technological protection measure; and

12          “(B) a technological protection measure ‘effec-  
13          tively protects a right of a copyright owner under  
14          this title’ if the measure, in the ordinary course of  
15          its operation, prevents, restricts, or otherwise limits  
16          the exercise of a right of a copyright owner under  
17          this title.

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

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

1       “(3) Nothing in this section shall require that the de-  
2 sign of, or design and selection of parts and components  
3 for, a consumer electronics, telecommunications, or com-  
4 puting product provide for a response to any particular  
5 technological protection measure, so long as such part or  
6 component or the product, in which such part or compo-  
7 nent is integrated, does not otherwise fall within the prohi-  
8 bitions of subsection (a)(2) or (b)(1).

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

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

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

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

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

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

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

9       “(4) This subsection may not be used as a defense  
10 to a claim under subsection (a)(2) or (b), nor may this  
11 subsection permit a nonprofit library, archives, or edu-  
12 cational institution to manufacture, import, offer to the  
13 public, provide, or otherwise traffic in any technology  
14 which circumvents a technological protection measure.

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

18           “(A) open to the public; or

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

23       “(e) LAW ENFORCEMENT AND INTELLIGENCE AC-  
24 TIVITIES.—This section does not prohibit any lawfully au-  
25 thorized investigative, protective, or intelligence activity of

1 an officer, agent or employee of the United States, a  
2 State, or a political subdivision of a State, or a person  
3 acting pursuant to a contract with such entities.

4 “(f) Notwithstanding the provisions of subsection  
5 (a)(1), a person who has lawfully obtained the right to  
6 use a copy of a computer program may circumvent a tech-  
7 nological protection measure that effectively controls ac-  
8 cess to a particular portion of that program for the sole  
9 purpose of identifying and analyzing those elements of the  
10 program that are necessary to achieve interoperability of  
11 an independently created computer program with other  
12 programs, and that have not previously been readily avail-  
13 able to the person engaging in the circumvention, to the  
14 extent any such acts of identification and analysis do not  
15 constitute infringement under this title.

16 “(g) Notwithstanding the provisions of subsections  
17 (a)(2) and (b), a person may develop and employ techno-  
18 logical means to circumvent for the identification and  
19 analysis described in subsection (f), or for the limited pur-  
20 pose of achieving interoperability of an independently cre-  
21 ated computer program with other programs, where such  
22 means are necessary to achieve such interoperability, to  
23 the extent that doing so does not constitute infringement  
24 under this title.

1       “(h) The information acquired through the acts per-  
2 mitted under subsection (f), and the means permitted  
3 under subsection (g), may be made available to others if  
4 the person referred to in subsections (f) or (g) 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 applicable law other than this title.

10       “(i) For purposes of subsections (f), (g), and (h), the  
11 term “interoperability” means the ability of computer pro-  
12 grams to exchange information, and for such programs  
13 mutually to use the information which has been ex-  
14 changed.

15       “(j) In applying subsection (a) to a component or  
16 part, the court may consider the necessity for its intended  
17 and actual incorporation in a technology, product, service  
18 or device, which (i) does not itself violate the provisions  
19 of this chapter and (ii) has the sole purpose to prevent  
20 the access of minors to material on the Internet.

21 **“§ 1202. Integrity of copyright management informa-**  
22 **tion**

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

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

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

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

8           “(1) intentionally remove or alter any copyright  
9           management information,

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

15           “(3) distribute, import for distribution, or pub-  
16           licly perform works, copies of works, or  
17           phonorecords, knowing that copyright management  
18           information has been removed or altered without au-  
19           thority of the copyright owner or the law,  
20           knowing, or, with respect to civil remedies under section  
21           1203, having reasonable grounds to know, that it will in-  
22           duce, enable, facilitate or conceal an infringement of any  
23           right under this title.

24           “(c) DEFINITION.—As used in this chapter, ‘copy-  
25           right management information’ means the following infor-

1 mation conveyed in connection with copies or phonorecords  
2 of a work or performances or displays of a work, including  
3 in digital form—

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

7           “(2) the name of, and other identifying infor-  
8 mation about, the author of a work;

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

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

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

24           “(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; or

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 such entities.

14          “(e) LIMITATIONS ON LIABILITY.—

15                 “(1) ANALOG TRANSMISSIONS.—In the case of  
16                 an analog transmission, a person who is making  
17                 transmissions in its capacity as a radio or television  
18                 broadcast station, or as a cable system, or someone  
19                 who provides programming to such station or sys-  
20                 tem, shall not be liable for a violation of subsection  
21                 (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.

4           “(2) DIGITAL TRANSMISSIONS.—

5           “(A) If a digital transmission standard for  
6           the placement of copyright management infor-  
7           mation for a category of works is set in a vol-  
8           untary, consensus standard-setting process in-  
9           volving a representative cross-section of radio or  
10          television broadcast stations or cable systems  
11          and copyright owners of a category of works  
12          that are intended for public performance by  
13          such stations or systems, a person identified in  
14          subsection (e)(1) shall not be liable for a viola-  
15          tion of subsection (b) with respect to the par-  
16          ticular copyright management information ad-  
17          dressed by such standard if—

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

21                  “(ii) the activity that constitutes such  
22                  violation is not intended to induce, enable,  
23                  facilitate or conceal infringement.

24           “(B) Until a digital transmission standard  
25           has been set pursuant to subparagraph (A) with

1           respect to the placement of copyright manage-  
2           ment information for a category or works, a  
3           person identified in subsection (e)(1) shall not  
4           be liable for a violation of subsection (b) with  
5           respect to such copyright management informa-  
6           tion, where the activity that constitutes such  
7           violation is not intended to induce, enable, fa-  
8           cilitate or conceal infringement, if—

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

13                  “(ii) the transmission of such infor-  
14                  mation by such person would conflict  
15                  with—

16                          “(I) an applicable government  
17                          regulation relating to transmission of  
18                          information in a digital signal;

19                          “(II) an applicable industry-wide  
20                          standard relating to the transmission  
21                          of information in a digital signal that  
22                          was adopted by a voluntary consensus  
23                          standards body prior to the effective  
24                          date of this section; or

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

12 **“§ 1203. Civil remedies**

13                  “(a) CIVIL ACTIONS.—Any person injured by a viola-  
14                  tion of section 1201 or 1202 may bring a civil action in  
15                  an appropriate United States district court for such viola-  
16                  tion.

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

19                         “(1) may grant temporary and permanent in-  
20                         junctions on such terms as it deems reasonable to  
21                         prevent or restrain a violation;

22                         “(2) at any time while an action is pending,  
23                         may order the impounding, on such terms as it  
24                         deems reasonable, of any device or product that is  
25                         in the custody or control of the alleged violator and

1 that the court has reasonable cause to believe was  
2 involved in a violation;

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

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

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

9 “(6) may, as part of a final judgment or decree  
10 finding a violation, order the remedial modification  
11 or the destruction of any device or product involved  
12 in the violation that is in the custody or control of  
13 the violator or has been impounded under paragraph  
14 (2).

15 “(c) AWARD OF DAMAGES.—

16 “(1) IN GENERAL.—Except as otherwise pro-  
17 vided in this chapter, a person committing a viola-  
18 tion of section 1201 or 1202 is liable for either—

19 “(A) the actual damages and any addi-  
20 tional profits of the violator, as provided in  
21 paragraph (2), or

22 “(B) statutory damages, as provided in  
23 paragraph (3).

24 “(2) ACTUAL DAMAGES.—The court shall  
25 award to the complaining party the actual damages

1 suffered by the party as a result of the violation,  
2 and any profits of the violator that are attributable  
3 to the violation and are not taken into account in  
4 computing the actual damages, if the complaining  
5 party elects such damages at any time before final  
6 judgment is entered.

7 “(3) STATUTORY DAMAGES.—

8 “(A) At any time before final judgment is  
9 entered, a complaining party may elect to re-  
10 cover an award of statutory damages for each  
11 violation of section 1201 in the sum of not less  
12 than \$200 or more than \$2,500 per act of cir-  
13 cumvention, device, product, component, offer,  
14 or performance of service, as the court consid-  
15 ers just.

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

21 “(4) REPEATED VIOLATIONS.—In any case in  
22 which the injured party sustains the burden of prov-  
23 ing, and the court finds, that a person has violated  
24 section 1201 or 1202 within three years after a final  
25 judgment was entered against the person for another

1 such violation, the court may increase the award of  
2 damages up to triple the amount that would other-  
3 wise be awarded, as the court considers just.

4 “(5) INNOCENT VIOLATIONS.—

5 “(A) IN GENERAL.—The court in its dis-  
6 cretion may reduce or remit the total award of  
7 damages in any case in which the violator sus-  
8 tains the burden of proving, and the court  
9 finds, that the violator was not aware and had  
10 no reason to believe that its acts constituted a  
11 violation.

12 “(B) NONPROFIT LIBRARY, ARCHIVES, OR  
13 EDUCATIONAL INSTITUTIONS.—In the case of a  
14 nonprofit library, archives, or educational insti-  
15 tution, the court shall remit damages in any  
16 case in which the library, archives, or edu-  
17 cational institution sustains the burden of prov-  
18 ing, and the court finds, that the library, ar-  
19 chives, or educational institution was not aware  
20 and had no reason to believe that its acts con-  
21 stituted a violation.

22 **“§ 1204. Criminal offenses and penalties**

23 “(a) IN GENERAL.—Any person who violates section  
24 1201 or 1202 willfully and for purposes of commercial ad-  
25 vantage or private financial gain—

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

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

7           “(b) **LIMITATION FOR NONPROFIT LIBRARY, AR-**  
8 **CHIVES, OR EDUCATIONAL INSTITUTION.**—Subsection (a)  
9 shall not apply to a nonprofit library, archives, or edu-  
10 cational institution.

11          “(c) **STATUTE OF LIMITATIONS.**—Notwithstanding  
12 section 507(a) of this title, no criminal proceeding shall  
13 be brought under this section unless such proceeding is  
14 commenced within five years after the cause of action  
15 arose.

16 **“§ 1205. Savings Clause**

17          “Nothing in this chapter abrogates, diminishes or  
18 weakens the provisions of, nor provides any defense or ele-  
19 ment of mitigation in a criminal prosecution or civil action  
20 under, any Federal or State law that prevents the violation  
21 of the privacy of an individual in connection with the indi-  
22 vidual’s use of the Internet.”.

23 **SEC. 104. CONFORMING AMENDMENT.**

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

“12. Copyright Protection and Management Systems ..... 1201”.

1 **SEC. 105. EFFECTIVE DATE.**

2 (a) IN GENERAL.—Subject to subsection (b), the  
3 amendments made by this title shall take effect on the  
4 date of the enactment of this Act.

5 (b) AMENDMENTS RELATING TO CERTAIN INTER-  
6 NATIONAL AGREEMENTS.—(1) The following shall take ef-  
7 fect upon entry into force of the WIPO Copyright Treaty  
8 with respect to the United States—

9 (A) paragraph (5) of the definition of “inter-  
10 national agreement” contained in section 101 of title  
11 17, United States Code, as amended by section  
12 102(a)(8) of this title;

13 (B) the amendment made by section 102(a)(10)  
14 of this title;

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

18 (D) subparagraph (C) of section 104A(h)(3) of  
19 title 17, United States Code, as amended by section  
20 102(c)(2) of this title.

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

24 (A) paragraph (6) of the definition of “inter-  
25 national agreement” contained in section 101 of title

1 17, United States Code, as amended by section  
2 102(a)(8) of this title;

3 (B) the amendment made by section 102(a)(11)  
4 of this title;

5 (C) the amendment made by section 102(b)(7)  
6 of this title;

7 (D) subparagraph (D) of section 104A(h)(1) of  
8 title 17, United States Code, as amended by section  
9 102(c)(2) of this title;

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

12 (F) the amendment made by section 102(c)(5)  
13 of this title.

14 **TITLE II—INTERNET COPYRIGHT**  
15 **INFRINGEMENT LIABILITY**

16 **SEC. 201. SHORT TITLE.**

17 This title may be cited as the “Internet Copyright  
18 Infringement Liability Clarification Act of 1998”.

19 **SEC. 202. LIMITATIONS ON LIABILITY FOR INTERNET COPY-**  
20 **RIGHT INFRINGEMENT.**

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

1 **“§ 512. Liability of service providers for online in-**  
2 **fringement of copyright**

3 “(a) DIGITAL NETWORK COMMUNICATIONS.—A serv-  
4 ice provider shall not be liable for monetary relief, or ex-  
5 cept as provided in subsection (i) for injunctive or other  
6 equitable relief, for infringement for the provider’s trans-  
7 mitting, routing, or providing connections for, material  
8 through a system or network controlled or operated by or  
9 for the service provider, or the intermediate and transient  
10 storage of such material in the course of such transmit-  
11 ting, routing or providing connections, if—

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

14 “(2) it is carried out through an automatic  
15 technical process without selection of such material  
16 by the service provider;

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

20 “(4) no such copy of such material made by the  
21 service provider is maintained on the system or net-  
22 work in a manner ordinarily accessible to anyone  
23 other than anticipated recipients, and no such copy  
24 is maintained on the system or network in a manner  
25 ordinarily accessible to the anticipated recipients for

1 a longer period than is reasonably necessary for the  
2 communication; and

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

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

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

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

17 “(3) the storage is carried out through an auto-  
18 matic technical process for the purpose of making  
19 such material available to users of such system or  
20 network who subsequently request access to that ma-  
21 terial from the person described in paragraph (1):

22 *Provided further, That—*

23 “(4) such material is transmitted to such subse-  
24 quent users without modification to its content from  
25 the manner in which the material otherwise was

1 transmitted from the person described in paragraph  
2 (1);

3 “(5) such service provider complies with rules  
4 concerning the refreshing, reloading or other updating  
5 of such material when specified by the person  
6 making that material available online in accordance  
7 with an accepted industry standard data commu-  
8 nications protocol for the system or network through  
9 which that person makes the material available: *Pro-*  
10 *vided further*, That the rules are not used by the  
11 person described in paragraph (1) to prevent or un-  
12 reasonably impair such intermediate storage;

13 “(6) such service provider does not interfere  
14 with the ability of technology associated with such  
15 material that returns to the person described in  
16 paragraph (1) the information that would have been  
17 available to such person if such material had been  
18 obtained by such subsequent users directly from  
19 such person: *Provided further*, That such tech-  
20 nology—

21 “(A) does not significantly interfere with  
22 the performance of the provider’s system or  
23 network or with the intermediate storage of the  
24 material;

1           “(B) is consistent with accepted industry  
2 standard communications protocols; and

3           “(C) does not extract information from the  
4 provider’s system or network other than the in-  
5 formation that would have been available to  
6 such person if such material had been accessed  
7 by such users directly from such person;

8           “(7) either—

9           “(A) the person described in paragraph (1)  
10 does not currently condition access to such ma-  
11 terial; or

12           “(B) if access to such material is so condi-  
13 tioned by such person, by a current individual  
14 pre-condition, such as a pre-condition based on  
15 payment of a fee, or provision of a password or  
16 other information, the service provider permits  
17 access to the stored material in significant part  
18 only to users of its system or network that have  
19 been so authorized and only in accordance with  
20 those conditions; and

21           “(8) if the person described in paragraph (1)  
22 makes that material available online without the au-  
23 thorization of the copyright owner, then the service  
24 provider responds expeditiously to remove, or disable  
25 access to, the material that is claimed to be infring-

1 ing upon notification of claimed infringements de-  
2 scribed in subsection (c)(3): *Provided further*, That  
3 the material has previously been removed from the  
4 originating site, and the party giving the notification  
5 includes in the notification a statement confirming  
6 that such material has been removed or access to it  
7 has been disabled or ordered to be removed or have  
8 access disabled.

9 “(c) INFORMATION STORED ON SERVICE PROVID-  
10 ERS.—

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

18 “(A)(i) does not have actual knowledge  
19 that the material or activity is infringing,

20 “(ii) in the absence of such actual knowl-  
21 edge, is not aware of facts or circumstances  
22 from which infringing activity is apparent, or

23 “(iii) if upon obtaining such knowledge or  
24 awareness, the service provider acts expedi-

1 tiously to remove or disable access to, the mate-  
2 rial;

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

7 “(C) in the instance of a notification of  
8 claimed infringement as described in paragraph  
9 (3), responds expeditiously to remove, or disable  
10 access to, the material that is claimed to be in-  
11 fringing or to be the subject of infringing activ-  
12 ity.

13 “(2) DESIGNATED AGENT.—The limitations on  
14 liability established in this subsection apply only if  
15 the service provider has designated an agent to re-  
16 ceive notifications of claimed infringement described  
17 in paragraph (3), by substantially making the name,  
18 address, phone number, electronic mail address of  
19 such agent, and other contact information deemed  
20 appropriate by the Register of Copyrights, available  
21 through its service, including on its website, and by  
22 providing such information to the Copyright Office.  
23 The Register of Copyrights shall maintain a current  
24 directory of agents available to the public for inspec-

1 tion, including through the Internet, in both elec-  
2 tronic and hard copy formats.

3 “(3) ELEMENTS OF NOTIFICATION.—

4 “(A) To be effective under this subsection,  
5 a notification of claimed infringement means  
6 any written communication provided to the  
7 service provider’s designated agent that includes  
8 substantially the following—

9 “(i) a physical or electronic signature  
10 of a person authorized to act on behalf of  
11 the owner of an exclusive right that is al-  
12 legedly infringed;

13 “(ii) identification of the copyrighted  
14 work claimed to have been infringed, or, if  
15 multiple such works at a single online site  
16 are covered by a single notification, a rep-  
17 resentative list of such works at that site;

18 “(iii) identification of the material  
19 that is claimed to be infringing or to be  
20 the subject of infringing activity that is to  
21 be removed or access to which is to be dis-  
22 abled, and information reasonably suffi-  
23 cient to permit the service provider to lo-  
24 cate the material;

1           “(iv) information reasonably sufficient  
2           to permit the service provider to contact  
3           the complaining party, such as an address,  
4           telephone number, and, if available an elec-  
5           tronic mail address at which the complain-  
6           ing party may be contacted;

7           “(v) a statement that the complaining  
8           party has a good faith belief that use of  
9           the material in the manner complained of  
10          is not authorized by the copyright owner,  
11          or its agent, or the law; and

12          “(vi) a statement that the information  
13          in the notification is accurate, and under  
14          penalty of perjury, that the complaining  
15          party has the authority to enforce the own-  
16          er’s rights that are claimed to be infringed.

17          “(B) A notification from the copyright  
18          owner or from a person authorized to act on be-  
19          half of the copyright owner that fails substan-  
20          tially to conform to the provisions of paragraph  
21          (3)(A) shall not be considered under paragraph  
22          (1)(A) in determining whether a service pro-  
23          vider has actual knowledge or is aware of facts  
24          or circumstances from which infringing activity  
25          is apparent: *Provided*, That the provider

1            promptly attempts to contact the complaining  
2            party or takes other reasonable steps to assist  
3            in the receipt of notice under paragraph (3)(A)  
4            when the notice is provided to the service pro-  
5            vider’s designated agent and substantially satis-  
6            fies the provisions of paragraphs (3)(A) (ii),  
7            (iii), and (iv).

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

16                    “(1) does not have actual knowledge that the  
17                    material or activity is infringing or, in the absence  
18                    of such actual knowledge, is not aware of facts or  
19                    circumstances from which infringing activity is ap-  
20                    parent;

21                    “(2) does not receive a financial benefit directly  
22                    attributable to the infringing activity, where the  
23                    service provider has the right and ability to control  
24                    such activity; and

1           “(3) responds expeditiously to remove or disable  
2           the reference or link upon notification of claimed in-  
3           fringement as described in subsection (c)(3): *Pro-*  
4           *vided*, That for the purposes of this paragraph, the  
5           element in subsection (c)(3)(A)(iii) shall be identi-  
6           fication of the reference or link, to material or activ-  
7           ity claimed to be infringing, that is to be removed  
8           or access to which is to be disabled, and information  
9           reasonably sufficient to permit the service provider  
10          to locate such reference or link.

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

13                 (1) that material or activity is infringing, or

14                 (2) that material or activity was removed or  
15          disabled by mistake or misidentification,

16 shall be liable for any damages, including costs and attor-  
17 neys’ fees, incurred by the alleged infringer, by any copy-  
18 right owner or copyright owner’s authorized licensee, or  
19 by the service provider, who is injured by such misrepre-  
20 sentation, as the result of the service provider relying upon  
21 such misrepresentation in removing or disabling access to  
22 the material or activity claimed to be infringing, or in re-  
23 placing the removed material or ceasing to disable access  
24 to it.

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

3           “(1) Subject to paragraph (2) of this sub-  
4 section, a service provider shall not be liable to any  
5 person for any claim based on the service provider’s  
6 good faith disabling of access to, or removal of, ma-  
7 terial or activity claimed to be infringing or based on  
8 facts or circumstances from which infringing activity  
9 is apparent, regardless of whether the material or  
10 activity is ultimately determined to be infringing.

11           “(2) Paragraph (1) of this subsection shall not  
12 apply with respect to material residing at the direc-  
13 tion of a subscriber of the service provider on a sys-  
14 tem or network controlled or operated by or for the  
15 service provider that is removed, or to which access  
16 is disabled by the service provider pursuant to a no-  
17 tice provided under subsection (c)(1)(C), unless the  
18 service provider—

19           “(A) takes reasonable steps promptly to  
20 notify the subscriber that it has removed or dis-  
21 abled access to the material;

22           “(B) upon receipt of a counter notice as  
23 described in paragraph (3), promptly provides  
24 the person who provided the notice under sub-  
25 section (c)(1)(C) with a copy of the counter no-

1           tice, and informs such person that it will re-  
2           place the removed material or cease disabling  
3           access to it in ten business days; and

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

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

19                  “(A) A physical or electronic signature of  
20                  the subscriber.

21                  “(B) Identification of the material that has  
22                  been removed or to which access has been dis-  
23                  abled and the location at which such material  
24                  appeared before it was removed or access was  
25                  disabled.

1           “(C) A statement under penalty of perjury  
2           that the subscriber has a good faith belief that  
3           the material was removed or disabled as a re-  
4           sult of mistake or misidentification of the mate-  
5           rial to be removed or disabled.

6           “(D) The subscriber’s name, address and  
7           telephone number, and a statement that the  
8           subscriber consents to the jurisdiction of Fed-  
9           eral Court for the judicial district in which the  
10          address is located, or if the subscriber’s address  
11          is outside of the United States, for any judicial  
12          district in which the service provider may be  
13          found, and that the subscriber will accept serv-  
14          ice of process from the person who provided no-  
15          tice under subsection (c)(1)(C) or agent of such  
16          person.

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

22          “(g) IDENTIFICATION OF DIRECT INFRINGER.—The  
23          copyright owner or a person authorized to act on the own-  
24          er’s behalf may request an order for release of identifica-  
25          tion of an alleged infringer by filing—

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

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

8   The order shall authorize and order the service provider  
9   receiving the notification to disclose expeditiously to the  
10  copyright owner or person authorized by the copyright  
11  owner information sufficient to identify the alleged direct  
12  infringer of the material described in the notification to  
13  the extent such information is available to the service pro-  
14  vider. The order shall be expeditiously issued if the accom-  
15  panying notification satisfies the provisions of subsection  
16  (c)(3)(A) and the accompanying declaration is properly ex-  
17  ecuted. Upon receipt of the order, either accompanying or  
18  subsequent to the receipt of a notification described in  
19  subsection (c)(3)(A), a service provider shall expeditiously  
20  give to the copyright owner or person authorized by the  
21  copyright owner the information required by the order,  
22  notwithstanding any other provision of law and regardless  
23  of whether the service provider responds to the notifica-  
24  tion.

25           “(h) CONDITIONS FOR ELIGIBILITY.—

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

4           “(A) has adopted and reasonably imple-  
5 mented, and informs subscribers of the service  
6 of, a policy for the termination of subscribers of  
7 the service who are repeat infringers; and

8           “(B) accommodates and does not interfere  
9 with standard technical measures as defined in  
10 this subsection.

11           “(2) DEFINITION.—As used in this section,  
12 ‘standard technical measures’ are technical meas-  
13 ures, used by copyright owners to identify or protect  
14 copyrighted works, that—

15           “(A) have been developed pursuant to a  
16 broad consensus of copyright owners and serv-  
17 ice providers in an open, fair, voluntary, multi-  
18 industry standards process;

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

21           “(C) do not impose substantial costs on  
22 service providers or substantial burdens on their  
23 systems or networks.

24           “(i) INJUNCTIONS.—The following rules shall apply  
25 in the case of any application for an injunction under sec-

1 tion 502 against a service provider that is not subject to  
2 monetary remedies by operation of this section.

3 “(1) SCOPE OF RELIEF.—

4 “(A) With respect to conduct other than  
5 that which qualifies for the limitation on rem-  
6 edies as set forth in subsection (a), the court  
7 may only grant injunctive relief with respect to  
8 a service provider in one or more of the follow-  
9 ing forms—

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

14 “(ii) an order restraining it from pro-  
15 viding access to an identified subscriber of  
16 the service provider’s system or network  
17 who is engaging in infringing activity by  
18 terminating the specified accounts of such  
19 subscriber; or

20 “(iii) such other injunctive remedies  
21 as the court may consider necessary to pre-  
22 vent or restrain infringement of specified  
23 copyrighted material at a particular online  
24 location: *Provided*, That such remedies are  
25 the least burdensome to the service pro-

1           vider that are comparably effective for that  
2           purpose.

3           “(B) If the service provider qualifies for  
4           the limitation on remedies described in sub-  
5           section (a), the court may only grant injunctive  
6           relief in one or both of the following forms—

7                   “(i) an order restraining it from pro-  
8                   viding access to an identified subscriber of  
9                   the service provider’s system or network  
10                  who is using the provider’s service to en-  
11                  gage in infringing activity by terminating  
12                  the specified accounts of such subscriber;  
13                  or

14                   “(ii) an order restraining it from pro-  
15                   viding access, by taking specified reason-  
16                   able steps to block access, to a specific,  
17                   identified, foreign online location.

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

21                   “(A) whether such an injunction, either  
22                   alone or in combination with other such injunc-  
23                   tions issued against the same service provider  
24                   under this subsection, would significantly bur-

1 den either the provider or the operation of the  
2 provider's system or network;

3 “(B) the magnitude of the harm likely to  
4 be suffered by the copyright owner in the digi-  
5 tal network environment if steps are not taken  
6 to prevent or restrain the infringement;

7 “(C) whether implementation of such an  
8 injunction would be technically feasible and ef-  
9 fective, and would not interfere with access to  
10 noninfringing material at other online locations;  
11 and

12 “(D) whether other less burdensome and  
13 comparably effective means of preventing or re-  
14 straining access to the infringing material are  
15 available.

16 “(3) NOTICE AND EX PARTE ORDERS.—Injunc-  
17 tive relief under this subsection shall not be available  
18 without notice to the service provider and an oppor-  
19 tunity for such provider to appear, except for orders  
20 ensuring the preservation of evidence or other orders  
21 having no material adverse effect on the operation of  
22 the service provider's communications network.

23 “(j) DEFINITIONS.—

24 “(1)(A) As used in subsection (a), the term  
25 ‘service provider’ means an entity offering the trans-

1 mission, routing or providing of connections for digi-  
2 tal online communications, between or among points  
3 specified by a user, of material of the user's choos-  
4 ing, without modification to the content of the mate-  
5 rial as sent or received.

6 “(B) As used in any other subsection of this  
7 section, the term ‘service provider’ means a provider  
8 of online services or network access, or the operator  
9 of facilities therefor, and includes an entity de-  
10 scribed in the preceding paragraph of this sub-  
11 section.

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

15 “(k) OTHER DEFENSES NOT AFFECTED.—The fail-  
16 ure of a service provider’s conduct to qualify for limitation  
17 of liability under this section shall not bear adversely upon  
18 the consideration of a defense by the service provider that  
19 the service provider’s conduct is not infringing under this  
20 title or any other defense.

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

24 “(1) a service provider monitoring its service or  
25 affirmatively seeking facts indicating infringing ac-

1 tivity except to the extent consistent with a standard  
 2 technical measure complying with the provisions of  
 3 subsection (h); or

4 “(2) a service provider accessing, removing, or  
 5 disabling access to material where such conduct is  
 6 prohibited by law.

7 “(m) **RULE OF CONSTRUCTION.**—Subsections (a),  
 8 (b), (c), and (d) are intended to describe separate and dis-  
 9 tinct functions for purposes of analysis under this section.  
 10 Whether a service provider qualifies for the limitation on  
 11 liability in any one such subsection shall be based solely  
 12 on the criteria in each such subsection and shall not affect  
 13 a determination of whether such service provider qualifies  
 14 for the limitations on liability under any other such sub-  
 15 section.”.

16 **SEC. 203. CONFORMING AMENDMENT.**

17 The table of sections for chapter 5 of title 17, United  
 18 States Code, is amended by adding at the end the follow-  
 19 ing:

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

20 **SEC. 204. LIABILITY OF EDUCATIONAL INSTITUTIONS FOR**  
 21 **ONLINE INFRINGEMENT OF COPYRIGHT.**

22 (a) Not later than six months after the date of enact-  
 23 ment of this Act, the Register of Copyrights, after con-  
 24 sultation with representatives of copyright owners and  
 25 nonprofit educational institutions, shall submit to the Con-

1 gress recommendations regarding the liability of nonprofit  
2 educational institutions for copyright infringement com-  
3 mitted with the use of computer systems for which such  
4 an institution is a service provider, as that term is defined  
5 in section 512 of title 17, United States Code, (as amend-  
6 ed by this Act), including recommendations for legislation  
7 the Register of Copyrights considers appropriate regard-  
8 ing such liability, if any.

9 (b) In formulating recommendations, the Register of  
10 Copyrights shall consider, where relevant—

11 (1) current law regarding the direct, vicarious,  
12 and contributory liability of nonprofit educational in-  
13 stitutions for infringement by faculty, administrative  
14 employees, students, graduate students, and stu-  
15 dents who are employees of a nonprofit educational  
16 institution;

17 (2) other users of their computer systems for  
18 whom nonprofit educational institutions may be re-  
19 sponsible;

20 (3) the unique nature of the relationship be-  
21 tween nonprofit educational institutions and faculty;

22 (4) what policies nonprofit educational institu-  
23 tions should adopt regarding copyright infringement  
24 by users of their computer systems;

1           (5) what technological measures are available to  
2 monitor infringing uses;

3           (6) what monitoring of their computer systems  
4 by nonprofit educational institutions is appropriate;

5           (7) what due process nonprofit educational in-  
6 stitutions should afford in disabling access by users  
7 of their computer systems who are alleged to have  
8 committed copyright infringement;

9           (8) what distinctions, if any, should be drawn  
10 between computer systems which may be accessed  
11 from outside the nonprofit educational systems,  
12 those which may not, and combinations thereof;

13           (9) the tradition of academic freedom; and

14           (10) such other issues relating to the liability of  
15 nonprofit educational institutions for copyright in-  
16 fringement committed with the use of computer sys-  
17 tems for which such an institution is a service pro-  
18 vider that the Register considers appropriate.

19 **SEC. 205. EFFECTIVE DATE.**

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

1                   **TITLE III—COMPUTER**  
2                   **MAINTENANCE OR REPAIR**

3   **SEC. 301. LIMITATION ON EXCLUSIVE RIGHTS; COMPUTER**  
4                   **PROGRAMS.**

5           Section 117 of title 17, United States Code, is  
6 amended—

7           (1) by striking “Notwithstanding” and insert-  
8           ing the following:

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

11           (2) by striking “Any exact” and inserting the  
12           following:

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

15           (3) by adding at the end the following new sub-  
16           sections:

17           “(c) MACHINE MAINTENANCE OR REPAIR.—Notwith-  
18 standing the provisions of section 106, it is not an in-  
19 fringement for an owner or lessee of a machine to make  
20 or authorize the making of a copy of a computer program  
21 if such copy is made solely by virtue of the activation of  
22 a machine that lawfully contains an authorized copy of  
23 the computer program, for purposes only of maintenance  
24 or repair of that machine, if—

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

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

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

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

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

19 **TITLE IV—EPHEMERAL RECORD-**  
20 **INGS; DISTANCE EDUCATION;**  
21 **EXEMPTION FOR LIBRARIES**  
22 **AND ARCHIVES**

23 **SEC. 401. EPHEMERAL RECORDINGS.**

24           Section 112 of title 17, United States Code, is  
25 amended by—

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

4           (2) in section 112(a)(1), after the reference to  
5           section 114(a), add the words “or for a transmitting  
6           organization that is a broadcast radio or television  
7           station licensed as such by the Federal Communica-  
8           tions Commission that broadcasts a performance of  
9           a sound recording in a digital format on a non-  
10          subscription basis,”;

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

12          “(2) Where a transmitting organization entitled to  
13          make a copy or phonorecord under section 112(a)(1) in  
14          connection with the transmission to the public of a per-  
15          formance or display of a work pursuant to that section  
16          is prevented from making such copy or phonorecord by  
17          reason of the application by the copyright owner of tech-  
18          nical measures that prevent the reproduction of the work,  
19          such copyright owner shall make available to the transmit-  
20          ting organization the necessary means for permitting the  
21          making of such copy or phonorecord within the meaning  
22          of that section: *Provided*, That it is technologically feasible  
23          and economically reasonable for the copyright owner to do  
24          so, and: *Provided further*, That, if such copyright owner  
25          fails to do so in a timely manner in light of the transmit-

1 ting organization’s reasonable business requirements, the  
2 transmitting organization shall not be liable for a violation  
3 of section 1201(a)(1) of this title for engaging in such ac-  
4 tivities as are necessary to make such copies or  
5 phonorecords as permitted under section 112(a)(1).”.

6 **SEC. 402. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE**  
7 **EDUCATION.**

8 (a) Not later than six months after the date of enact-  
9 ment of this Act, the Register of Copyrights, after con-  
10 sultation with representatives of copyright owners, non-  
11 profit educational institutions and nonprofit libraries and  
12 archives, shall submit to the Congress recommendations  
13 on how to promote distance education through digital  
14 technologies, including interactive digital networks, while  
15 maintaining an appropriate balance between the rights of  
16 copyright owners and the needs of users. Such rec-  
17 ommendations shall include any legislation the Register of  
18 Copyrights considers appropriate to achieve the foregoing  
19 objective.

20 (b) In formulating recommendations, the Register of  
21 Copyrights shall consider—

22 (1) the need for an exemption from exclusive  
23 rights for distance education through digital net-  
24 works;

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

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

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

8           (5) the parties who should be designated as eli-  
9 gible recipients of distance education materials  
10 under any distance education exemption;

11          (6) whether and what types of technological  
12 measures can and/or should be employed to safe-  
13 guard against unauthorized access to, and use or re-  
14 tention of, copyrighted materials as a condition to  
15 eligibility for any distance education exemption, in-  
16 cluding, in light of developing technological capabili-  
17 ties, the exemption set out in section 110(2);

18          (7) the extent to which the availability of li-  
19 censes for the use of copyrighted works in distance  
20 education through interactive digital networks  
21 should be considered in assessing eligibility for any  
22 distance education exemption; and

23          (8) such other issues relating to distance edu-  
24 cation through interactive digital networks that the  
25 Register considers appropriate.

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

2 Section 108 of title 17, United States Code, is  
3 amended—

4 (1) in subsection (a) by—

5 (A) striking “Notwithstanding” and insert-  
6 ing “Except as otherwise provided and notwith-  
7 standing”;

8 (B) inserting after “no more than one copy  
9 of phonorecord of a work” the following: “ex-  
10 cept as provided in subsections (b) and (c),”;  
11 and

12 (C) by inserting after “copyright” in para-  
13 graph (3) the following: “if such notice appears  
14 on the copy or phonorecord that is reproduced  
15 under the provisions of this section, or a legend  
16 stating that the work may be protected by copy-  
17 right if no such notice can be found on the copy  
18 or phonorecord that is reproduced under the  
19 provisions of this section”;

20 (2) in subsection (b) by—

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

24 (B) striking “in facsimile form”; and

25 (C) striking “if the copy or phonorecord  
26 reproduced is currently in the collections of the

1 library or archives.” and inserting in lieu there-  
2 of “if—

3 “(1) the copy or phonorecord reproduced is cur-  
4 rently in the collections of the library or archives;  
5 and

6 “(2) any such copy or phonorecord that is re-  
7 produced in digital format is not otherwise distrib-  
8 uted in that format and is not made available to the  
9 public outside the premises of the library or archives  
10 in that format.”; and

11 (3) in subsection (c) by—

12 (A) striking “a copy or phonorecord” and  
13 inserting in lieu thereof “three copies or  
14 phonorecords”;

15 (B) striking “in facsimile form”;

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

19 (D) striking “if the library or archives has,  
20 after a reasonable effort, determined that an  
21 unused replacement cannot be obtained at a  
22 fair price.” and inserting in lieu thereof “if—

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

1           “(2) any such copy or phonorecord that is re-  
2           produced in digital format is not made available to  
3           the public in that format except for use on the prem-  
4           ises of the library or archives in lawful possession of  
5           such copy.”;

6           (E) adding at the end the following: “For  
7           purposes of this subsection, a format shall be  
8           considered obsolete if the machine or device  
9           necessary to render perceptible a work stored in  
10          that format is no longer manufactured or is no  
11          longer reasonably available in the commercial  
12          marketplace.”.

Passed the Senate May 14, 1998.

Attest:

*Secretary.*

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

# **S. 2037**

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## **AN ACT**

To amend title 17, United States Code, to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, to provide limitations on copyright liability relating to material online, and for other purposes.

S 2037 ESIS—2

S 2037 ESIS—3

S 2037 ESIS—4

S 2037 ESIS—5