

108TH CONGRESS  
1ST SESSION

# H. R. 1066

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

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 4, 2003

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

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## A BILL

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

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

3        **SECTION 1. SHORT TITLE.**

4        This Act may be cited as the “Benefit Authors with-  
5        out Limiting Advancement or Net Consumer Expectations  
6        (BALANCE) Act of 2003”.

7        **SEC. 2. FINDINGS.**

8        The Congress makes the following findings:

9                (1) The law of copyright is often described as  
10        a “difficult balance between the interests of authors

1 . . . in the control and exploitation of their writings  
2 . . . on the one hand, and society’s competing inter-  
3 est in the free flow of ideas, information, and com-  
4 merce on the other hand.” *Sony Corp. v. Universal*  
5 *City Studios, Inc.*, 464 U.S. 417, 429 (1984).

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

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

23 (4) Advances in technology have often prompted  
24 changes to the copyright laws to maintain the bal-  
25 ance. For example, the development of player pianos

1       preceded the enactment of the Copyright Act of  
2       1909. The development of cable television prompted  
3       complex reforms to section 111 of title 17, United  
4       States Code. *Sony*, 464 U.S. at 430–31.

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

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

24          (7) Contrary to the intent of Congress, section  
25      1201 of title 17, United States Code, has been inter-

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

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

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

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

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

7 (b) PERMISSIBLE USES OF DIGITAL WORKS.—

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

11 **“§ 123. Limitations on exclusive rights; Permissible**  
12 **uses of digital works**

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

19 “(1) for archival purposes, if all such archival  
20 copies are destroyed or rendered permanently inac-  
21 cessible in the event that continued possession of the  
22 work should cease to be rightful; and

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

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

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

9           “(1) A ‘digital work’ is any literary work (ex-  
10 cept a computer program), sound recording, musical  
11 work, dramatic work, or motion picture or other  
12 audiovisual work, in whole or in part in a digital or  
13 other nonanalog format.

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

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

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

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

5 **SEC. 4. DIGITAL FIRST SALE.**

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

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

16 **SEC. 5. PERMISSIBLE CIRCUMVENTION TO ENABLE FAIR**  
17 **USE AND CONSUMER EXPECTATIONS.**

18          Section 1201 of title 17, United States Code, is  
19          amended—

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

22               (2) by inserting after subsection (b) the fol-  
23               lowing:

24               “(c) CIRCUMVENTION FOR NONINFRINGING USES.—

25               (1) Notwithstanding any other provision in this title, a

1 person who lawfully obtains a copy or phonorecord of a  
2 work, or who lawfully receives a transmission of a work,  
3 may circumvent a technological measure that effectively  
4 controls access to the work or protects a right of the copy-  
5 right holder under this title if—

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

8           “(B) the copyright owner fails to make publicly  
9           available the necessary means to make such non-  
10          infringing use without additional cost or burden to  
11          such person.

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

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

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

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

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