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Citation: 5 William H. Manz Federal Copyright Law The Histories of the Major Enactments of the 105th S9935 1999

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and, at the same time, significantly expedite environmentally responsible cleanups.

It was our hope to craft a bipartisan bill that could be enacted this year. Our goal was a shared one—to develop legislation to eliminate overly restrictive treatment standards for mediation waste, to streamline permitting requirements, and preserve existing State cleanup programs, all while still ensuring that human health and the environment are protected. Under Senator LOTT's leadership, we worked hard to achieve that goal and I believe that we made significant progress in resolving our differences. Unfortunately, we were not able to reach a final agreement and we have essentially run out of time.

I remain committed, however, to the goal of improving the remediation waste program. I continue to believe that this is an important issue and that with appropriate legislation we can achieve a significant environment benefit—cleaning up thousands of contaminate sites and saving billions of dollars. That is clearly a worthwhile goal. Therefore, I intend to make RCRA reform a priority for the Environment and Public Works Committee in the next Congress. Building on the progress that we have made this year, and with Senator LOTT'S continued leadership, it is my hope that we will move legislation through the Senate early in the next Congress.

RCRA REMEDIATION WASTE LEGISLATION

Mr. SMITH of New Hampshire. Mr. President, it is with some regret that I am here today to join my colleagues, Majority Leader TRENT LOTT and Environment Committee Chairman JOHN CHAFEE, in announcing that we will be unable to enact legislation this year to reform the remediation waste provisions of the Resource Conservation and Recovery Act.

As many of my colleagues know, since I became Chairman of the Senate Superfund Subcommittee, which has jurisdiction over the RCRA, it had become apparent to me that hazardous waste cleanups in the United States take too long, are too costly, and result in widespread areas of our country becoming brownfield wastelands.

Since I introduced RCRA remediation legislation in the 104th Congress, S. 1286, I have attempted to work with Senators LOTT, CHAFEE, BREAUX, BAUCUS, and LAUTENBERG, with the Clinton administration, States, and members of the industrial and environmental communities to achieve a bipartisan fix to this confusing and burdensome law. Despite our best efforts and the dedicated work of our respective staff, we weren't able to come to agreement.

It is particularly troublesome that we come to this juncture given the fact that just about a year ago we received a report from the GAO (*Hazardous Waste—Remediation Waste Requirements Can Increase the Time and Cost of Cleanups*) that demonstrated the urgency of fixing the remediation waste program. Although I have quoted that report previously, I believe that it is worth repeating today.

Despite the fact that remediation waste "does not pose a significant threat to human health and the environment," the RCRA requirements are so costly and time consuming that "parties often try to avoid triggering the requirements by containing waste in place or by abandoning cleanups entirely."

The report further stated that RCRA "can drive parties to use less aggressive and perhaps less effective cleanup methods, such as leaving contaminated soil in place and placing a waterproof cover over it rather than treating it." Instead of dealing with the problem, the statute forces parties to "purchase land elsewhere for their plant expansion or other needs."

Even the EPA, which is responsible for implementing the statute is quoted in the report as stating: "Although cleaning up a site may offer economic benefits, such as relief from liability for contamination and increased property values, industry sometimes concludes that the costs of complying with RCRA can outweigh the benefits."

According to the GAO report we could save upwards of $2 billion per year by making some common sense legislative fixes to RCRA—cost savings that would really jump-start the efforts by industry to address these languishing sites. Nonetheless, despite tireless efforts by members and staff, and notwithstanding good progress in translating these changes into legislative language, it appears that we will not be able to accomplish our shared goal of passing a RCRA remediation waste rifle shot during the time we have left in the 105th Congress.

As I conclude my statement, I would like to join Senator LOTT and Senator CHAFEE in pledging my desire to press forward on this issue when the Senate returns next year. Perhaps the additional time will give the staff the additional opportunity to bridge the gaps that currently separate us.

Finally, in addition to thanking Senator LOTT and Senator CHAFEE for their leadership on this issue, I would like to thank our staff, Jeff Merrifield, Lynne Stauss, Ann Klee Carl Biersack and Kristy Sims for their hard work on this issue. Similarly, I would like to recognize Senator BAUCUS and LAUTENBERG and their staff for their hard work on attempting to come to a consensus.

Again, I am disappointed that we were unable to make this happen this year, but I am hopeful that we can make it happen in 1999.

UPDATE ON THE WIPO LEGISLATION

Mr. ASHCROFT. Mr. President, I wanted to take a few minutes to advise my colleagues that H.R. 2281, a bill to implement the World Intellectual Property Organization copyright treaties, has been adopted by the House, but in a substantially different form than the Senate bill to implement these treaties. The House version of the bill includes some improvements agreed to by representatives of the affected industries, but it also includes some extraneous provisions, which in some cases were negotiated without the full participation of important affected individuals. A number of my colleagues have expressed to my office their continuing interest in this legislation, and so I thought it would be helpful to provide an update on the legislative developments in the House, and to share with you some of my concerns about the many extraneous provisions added to the bill.

On July 22, the Committee on Commerce filed its report on H.R. 2281, the Digital Millennium Copyright Act of 1998. In drafting the bill, the Committee used as the base text the bill approved by the Senate, and then made some substantive and clarifying changes. I understand that the Commerce Committee version of the legislation represents an agreed upon compromise by the content community and the fair use community. Moreover, I understand that these groups have agreed to support the agreement throughout the remaining process. Some aspects of this agreement concern important issues that I worked to have addressed in the Senate version of the bill. Let me describe a few of the most important aspects of the agreement.

First, with respect to "fair use," the Committee adopted an alternative to section 1201(a)(1) that would authorize the Secretary of Commerce to waive selectively the prohibition against the act of circumvention to prevent a diminution in the availability to individual users of a particular category of copyrighted materials. As adopted by the Senate, this section would have established a flat prohibition on the circumvention of technological protection measures to gain access to works for any purpose, and thus a system that some have described as the beginning of a "pay-per-use" society. Under the compromise embodied in the Commerce Committee's version of the bill, the Secretary of Commerce would have authority to address the concerns of libraries, educational institutions, and others potentially threatened with a denial of access to categories of works in circumstances that otherwise would be lawful today.

Second, the Committee made an important contribution by eliminating the potential for misinterpretation of the "no mandate" provision of the bill. I had been very concerned that S. 2037 could be interpreted as a mandate on product manufacturers to design products so as to respond affirmatively to or to accommodate technological protection measures that copyright owners might use to deny access to or prevent the copying of their works. To address this potential problem, I offered an amendment providing that nothing in the bill required that the design of, or design and selection of parts and components for, a computing product, a consumer electronics, or a telecommunications product must provide

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for a response to any particular technological protection measures. The amendment reflected my belief that product manufacturers should remain free to design and produce the best available products, without the threat of incurring liability for their design decisions. Technology and engineers—not lawyers—should dictate product design. This provision reflected the working assumption that this bill is aimed fundamentally at so-called "black boxes" and not at legitimate products that have substantial non-infringing uses. The Commerce Committee has tightened this language even further making it crystal clear that nothing in this legislation should be interpreted to limit manufacturers of legitimate products with substantial non-infringing uses—such as VCRs and personal computers—in making fundamental design decisions or revisions.

Third, as an important related matter, the Committee on Commerce reaffirmed my view that technological protection measures that cause "playability" problems may not be deemed to be "effective" under this legislation. As I pointed out in my floor speech just prior to final passage of S. 2037, "playability" problems may arise because technological protection measures may cause noticeable and recurring adverse effects on the normal operation of products. Adjustments may need to be made either in the factory or after sale to correct these playability problems. It was my view that the legislation did not make such adjustments illegal, and I was pleased to note that the Commerce Committee made this point explicit in its Committee Report. The Commerce Committee's report also included helpful language circumscribing the potential breadth of the bill by narrowly defining the types of technological protection measures that control access to, or the copying of, a work.

In addition, the Committee of Commerce adopted specific provisions making it clear that the bill is not intended to prohibit legitimate encryption research. As my colleagues know, Senator BURNS, LEAHY and I have lead the effort in the Senate to ensure that U.S. business can develop, and export world-class encryption products. By explicitly fashioning an affirmative defense, the Committee has made an important contribution to our overall efforts to ensure that U.S. industry remains at the forefront in developing secure encryption methods.

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

In sum, the House version of the bill by and large reflects the substantial improvements proposed by the House Committee on Commerce. In his floor statement, Congressman BLILEY of Virginia, made clear the importance the Committee attaches to the "fair use" and "no mandate" provisions included in the bill. He and others reaffirmed as well the Committee's report language with respect to the definition of technological measures and the inapplicability of the legislation to manufacturers, retailers, product servicers, and ordinary consumers when faced with playability problems caused by either protection measures or copyright management information systems. None of the Members of the Judiciary Committee present offered contrary views about these important provisions, which represent a delicate compromise agreement of the interested parties. I thus would hope we can assume that these matters have been definitively settled.

Since the passage of the House language several issues have begun to arise that have either been caused by the drafting in the House, or as is more often the case, through the unintended consequences of outlawing technology. Perhaps the most troubling of these issues is making security system testing illegal and criminally punishable. Currently, the federal government agencies, companies, state governments, anyone with a computer system can hire professional consultants to survey and test their IT security systems for vulnerabilities.

Two of the best known organizations that engage in this sort of consulting are Price Waterhouse Coopers and Ernst & Young, clearly two well-known and responsible corporate citizens. With the language currently in the WIPO legislation these critical services will no longer be legal. The impact will be destructive to existing businesses and to any future promise of electronic commerce. Moreover, without this type of beneficial testing, our country's critical infrastructure will be at risk from domestic and international hackers and cyber-terrorists. This effect must surely be unintended, as even those who support the current language would be at grave risk if our communications, security, and Internet systems were left without adequate protection.

On August 4, the House adopted H.R. 2281 by voice vote. For reasons not explained on the floor, the bill contains a series of extraneous measures that have little or nothing to do with the underlying WIPO copyright treaties. I would call to the attention of my colleagues in particular sections 414, 416, and 417, as well as titles V and VI, of the bill. Unfortunately, the floor debate in the House offered little insight into the anticipated effect or scope of these provisions. They appear to have been added by the House Committee on the Judiciary, but none of the Members of the Committee described in any way the substance of these measures on the floor.

Section 414 makes what ostensibly is only a clarifying change to section 107 of the Copyright Act. No one from the House Committee on the Judiciary, however, said a word on the floor about why this change to the "fair use" provision is necessary.

Section 415 inhibits the continued development and the further introduction of new digital subscription music services. Again, I am left to wonder why this provision is necessary, or even whether it has been carefully considered by anyone here in the Senate. Apparently, the 1995 Act regarding digital performance rights in sound recordings was reopened to resolve ambiguous issues. What has resulted seems to be a two tiered approach to subscription service. One tier consisting of existing providers that may compete effectively and a second tier of providers without an up and running system who will be hobbled by many new restrictions and at a greater cost. Not surprisingly, this second group was not represented in the negotiations.

The net result of this will be a significant advantage for incumbent providers that reflects a legislative advantage, not a competitive advantage. For those of us who believe that the market, not the government, should pick winners, this is a disturbing development. Even worse, there is a small group of companies who paid the government for spectrum based on the assumption that they could provide subscription service unencumbered, but because they have not yet provided service will now have to operate under these new, anti-competitive rules. The result is that the spectrum they purchased will have a vastly diminished value. This is precisely the type of regulatory taking that discourages and demoralizes the kind of investment and innovation the country needs to take full advantage of the promise of new technologies.

Section 416 concerns the assumption of contractual obligations related to transfer of rights in motion pictures. No one from the House Committee on the Judiciary said a word on the floor about why this provision is necessary to WIPO implementing legislation.

Section 417 makes what ostensibly is only a clarifying change to the first sale doctrine. No one from the House Committee on the Judiciary, however, said a word on the floor about why this change to the first sale doctrine is necessary, or what relation the provision has to a recent Supreme Court decision. Before the Senate is asked to act

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on any of these extraneous matters, we need to be convinced that the measures belong in this bill.

Title V apparently sets forth the views of the House Committee on the Judiciary on how best to provide legal protection against misappropriation of collections of information such as databases. I understand that the Administration has indicated that it has serious reservations about this approach, including a concern that it may be unconstitutional. This is a matter the Senate Judiciary Committee plans to address in scheduled hearings. Until those hearings take place, I see no reason to endanger the WIPO bill with a potentially controversial issue that the full Senate Judiciary Committee has not had an opportunity to examine.

Title VI would provide protection for certain boat hull designs. As in the case of the other extraneous provisions added in the House, no one from the House Committee on the Judiciary said a word on the floor about why this change to current law is necessary. At worst, this provision represents fundamental shift in the tradition and breadth of copyright law. At best, it is a dubious idea that was attached without discussion or consideration. The Senate should not include this extraneous matter in the WIPO bill without deliberation.

I would hope all parties to the debate would recognize that much has been done to calibrate the WIPO copyright treaties implementing legislation. Each of us, working alone, would undoubtedly have produced a different bill. In fact, last fall I introduced a bill that I believe did a far better job of implementing the treaties and did not need dozens of carve-outs to deal with the problems created by the approach recommended by the Administration. In any event, we are now late in the session. Much important work has been done in the Senate, and I want to thank the Chairman and Ranking Member of the Judiciary Committee for working with me this spring to address my concerns with this bill. I think the House Committee on Commerce has made additional important contributions. This bill is not a perfect bill, but it is an important bill. Before taking any final action, we should eliminate the extraneous provisions in this bill, while preserving the true heart of the legislation: the WIPO legislation. However, once that analysis has been completed, I would hope we could move this legislation forward.

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Williams, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-6652. A communication from the Chief of the Programs and Legislation Division, Office of Legislative Liaison, Department of the Air Force, transmitting, pursuant to law, notice of a cost comparison of the Air Force Research Laboratory support functions at Wright-Patterson Air Force Base, Ohio; to the Committee on Armed Services.

EC-6653. A communication from the Chief of the Programs and Legislation Division, Office of Legislative Liaison, Department of the Air Force, transmitting, pursuant to law, notice of a cost comparison of the Civil Engineering functions at Wright-Patterson Air Force Base, Ohio; to the Committee on Armed Services.

EC-6654. A communication from the Chief of the Programs and Legislation Division, Office of Legislative Liaison, Department of the Air Force, transmitting, pursuant to law, notice of a cost comparison of the Communications and Telephone Services functions at Wright-Patterson Air Force Base, Ohio; to the Committee on Armed Services.

EC-6655. A communication from the Administrator of the Grain Inspection, Packers and Stockyards Administration, Department of Agriculture, transmitting, pursuant to law, the report of a rule entitled "Official/Unofficial Weighing Service" (RIN0580-AA55) received on August 28, 1998; to the Committee on Agriculture, Nutrition, and Forestry.

EC-6656. A communication from the Administrator of the Grain Inspection, Packers and Stockyards Administration, Department of Agriculture, transmitting, pursuant to law, the report of a rule entitled "Mediterranean Fruit Fly; Removal of Quarantine Area" (Docket 97-056-16) received on August 28, 1998; to the Committee on Agriculture, Nutrition, and Forestry.

EC-6657. A communication from the Director of the Office of Regulations Management, Department of Veterans Affairs, transmitting, pursuant to law, the report of a rule entitled "Additional Disability or Death Due to Hospital Care, Medical or Surgical Treatment, Examination, or Training and Rehabilitation Services" (RIN2900-AJ04) received on August 28, 1998; to the Committee on Veterans Affairs.

EC-6658. A communication from the Director of the Office of Regulations Management, Department of Veterans Affairs, transmitting, pursuant to law, the report of a rule entitled "Election of Education Benefits," (RIN2900-AH88) received on August 28, 1998; to the Committee on Veterans Affairs.

EC-6659. A communication from the Secretary of the Treasury, transmitting, pursuant to law, the report of the Office of Inspector General for the period October 1, 1997 through March 31, 1998; to the Committee on Governmental Affairs.

EC-6660. A communication from the Acting Director of the Bureau of the Census, Department of Commerce, transmitting, pursuant to law, the report of a rule entitled "Revisions to the Foreign Trade Statistics Regulations; Shipper's Export Declaration Requirements for Exports Valued at Less that $2,500" (RIN0607-AA28) received on August 28, 1998; to the Committee on Governmental Affairs.

EC-6661. A communication from the General Counsel of the Federal Retirement Thrift Investment Board, transmitting, pursuant to law, the report of a rule entitled "Thrift Savings Plan Loans" received on August 28, 1998; to the Committee on Governmental Affairs.

EC-6662. A communication from the Acting Assistant General Counsel for Regulations, Department of Education, transmitting, pursuant to law, the report of a rule regarding Fulbright-Hays Programs (RIN1840-AC53) received on August 28, 1998; to the Committee on Labor and Human Resources.

EC-6663. A communication from the Director of the Regulations Policy and Management Staff, Food and Drug Administration, Department of Health and Human Services, transmitting, pursuant to law, the report of a rule entitled "Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers (benzenesulfonic acid)" (Docket 97F-0467) received on August 28, 1998; to the Committee on Labor and Human Resources.

EC-6664. A communication from the Director of the Regulations Policy and Management Staff, Food and Drug Administration, Department of Health and Human Services, transmitting, pursuant to law, the report of a rule entitled "Irradiation in the Production, Processing and Handling of Food" (Docket 98N-0392) received on August 28, 1998; to the Committee on Labor and Human Resources.

EC-6665. A communication from the Director of the Regulations Policy and Management Staff, Food and Drug Administration, Department of Health and Human Services, transmitting, pursuant to law, the report of a rule entitled "Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers (light stabilizer)" (Docket 98F-0055) received on August 28, 1998; to the Committee on Labor and Human Resources.

EC-6666. A communication from the President of the United States, transmitting, pursuant to law, notice of an Executive Order to amend Executive Order 12947 in order to more effectively respond to the worldwide threat posed by foreign terrorists; to the Committee on Banking, Housing, and Urban Affairs.

EC-6667. A communication from the Assistant to the Board of Governors of the Federal Reserve System, transmitting, pursuant to law, the report of a rule entitled "Extended Examination Cycle for U.S. Branches and Agencies of Foreign Banks" (Docket R-1012) received on August 28, 1998; to the Committee on Banking, Housing, and Urban Affairs.

EC-6668. A communication from the President and Chairman of the Export-Import Bank of the United States, transmitting, pursuant to law, notice of a financial guarantee to the Chase Manhattan Bank on a loan to the Ministry of Finance of Croatia; to the Committee on Banking, Housing, and Urban Affairs.

EC-6669. A communication from the President and Chairman of the Export-Import Bank of the United States, transmitting, pursuant to law, notice of a loan guarantee Petroleos Mexicanos, Mexico, to support the export sale of oil and gas services and equipment; to the Committee on Banking, Housing, and Urban Affairs.

EC-6670. A communication from the Federal Register Liaison Officer of the Office of Thrift Supervision, Department of the Treasury, transmitting, pursuant to law, the report of a rule entitled "Charter and Bylaws; One Member, One Vote" (RIN1550-AB17) received on August 28, 1998; to the Committee on Banking, Housing, and Urban Affairs.

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