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Citation: 4 Bernard D. Reams Jr. Law of E-SIGN A Legislative of the Electronic Signatures in Global and National Act Public Law No. 106-229 2000 iii 2002

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DIGITAL MILLENNIUM COPYRIGHT ACT -- HON. TOM BLILEY (Extension of Remarks - October 13, 1998)

[Page: E2136]

HON. TOM BLILEY

in the House of Representatives

MONDAY, OCTOBER 12, 1998

- Mr. BLILEY. Mr. Speaker, as Chairman of the Committee on Commerce, I want to make some additional comments. Specifically, given that the Conference Report contains several new provisions, I want to supplement the legislative history for this legislation to clarify the Conferees' intent, as well as make clear the constitutional bases for our action. Given the inherent page and time limitations of spelling everything out in a conference report, I wanted to share our perspective with our colleagues before they vote on this important legislation. Moreover, given the unfortunate proclivity of some in our society to file spurious lawsuits, I don't want there to be any misunderstanding about the scope of this legislation, especially the very limited scope of the device provisions in Title I and the very broad scope of the exceptions to section 1201(a)(1).

- Throughout the 105th Congress, the Committee on Commerce has been engaged in a wide-ranging review of all the issues affecting the growth of electronic commerce. Exercising our jurisdiction under the commerce clause to the Constitution and under the applicable precedents of the House, our Committee has a long and well-established role in assessing the impact of possible changes in law on the use and the availability of the products and services that have made our information technology industry the envy of the world. We therefore paid particular attention to the impacts on electronic commerce of the bill produced by the Senate and our colleagues on the House Judiciary Committee.

- Much like the agricultural and industrial revolutions that preceded it, the digital revolution has unleashed a wave of economic prosperity and job growth. Today, the U.S. information technology industry is developing exciting new products to enhance the lives of individuals throughout the world, and our telecommunications industry is developing new means of distributing information to these consumers in every part of the globe. In this environment, the development of new laws and regulations could well have a profound impact on the growth of electronic commerce.

- Article 1, section 8, clause 8 of the United States Constitution authorizes the Congress to promulgate laws governing the scope of proprietary rights in, and use privileges with respect to, intangible `works of authorship.' As set forth in the Constitution, the fundamental goal is `[t] o promote the Progress of Science and useful Arts. . . .' In the more than 200 years since enactment

- of the first federal copyright law in 1790, the maintenance of this balance has contributed

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significantly to the growth of markets for works of the imagination as well as the industries that enable the public to have access to and enjoy such works.

- Congress has historically advanced this constitutional objective by regulating the use of information--not the devices or means by which the information is delivered or used by information consumers--and by ensuring an appropriate balance between the interests of copyright owners and information users. Section 106 of the Copyright Act of 1976, 17 U.S.C. 106, for example, establishes certain rights copyright owners have in their works, including limitations on the use of these works without their authorization. Sections 107 through 121 of the Copyright Act, 17 U.S.C. 107-121, set forth the circumstances in which such uses will be deemed permissible or otherwise lawful even though unauthorized. In general, all of these provisions are technology neutral. They do not regulate commerce in information technology. Instead, they prohibit certain actions and create exceptions to permit certain conduct deemed to be in the greater public interest, all in a way that balances the interests of copyright owners and users of copyrighted works.

- As proposed by the Clinton Administration, however, the anti-circumvention provisions to

[Page: E2137]

implement the WIPO treaties would have represented a radical departure from this tradition. In a September 16, 1997 letter to Congress, 62 distinguished law professors expressed their concern about the implications of regulating devices through proposed section 1201. They said in relevant part: JE]nactment of Section 1201 would represent an unprecedented departure into the zone of what might be called paracopyright--.an uncharted new domain of legislative provisions designed to strengthen copyright protection by regulating conduct which traditionally has fallen outside the regulatory sphere of intellectual property law.'

- The ramifications of such a fundamental shift in law would be quite significant. Under section 1201(a)(1) as proposed by the Administration, for example, a copyright owner could deny a person access to a work, even in situations that today would be perfectly lawful as a legitimate 'fair use' of the work. In addition, under section 1201 (b) as proposed by the Administration, a copyright owner could successfully block the manufacturing and sale of a device used to make fair use copies of copyrighted works, effectively overruling the Supreme Court's landmark decision in *Sony Corporation ofAmerica v. Universal Studios, Inc.,* 464 U.S. 417 (1984).

- In the view of our Committee, there was no need to create such risks, including the risk that enactment of the bill could establish the legal framework that would inexorably create a 'pay-per-use' society. The WIPO treaties permit considerable flexibility in the means by which they may be implemented. The texts agreed upon by the delegates to the December 1996 WIPO Diplomatic Conference specifically allow contracting states to 'carry forward and appropriately extend into the digital environment limitation and exceptions in their national laws which have been considered acceptable under the Berne Convention' and to 'devise new exceptions and limitations that are appropriate in the digital network environment.'

- Thus, the Committee endeavored to specify, with as much clarity as possible, how the anti-circumvention right, established in title 17 but outside of the Copyright Act, would be qualified to maintain balance between the interests of content creators and information users. The Committee considered it particularly important to ensure that the concept of fair use remain firmly established in the law and that consumer electronics, telecommunications, computer, and other legitimate device manufacturers have the freedom to design new products without being subjected to the threat of litigation for making design decisions. The manner in which

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this balance has been achieved is spelled out in greater detail below.

- In making our proposed recommendations, the Committee on Commerce acted under both the `copyright' clause and the commerce clause. Both the conduct and device provisions of section 1201 create new rights in addition to those which Congress is authorized to recognize under Article I, Section 8, Clause 8. As pointed out by the distinguished law professors quoted above, this legislation is really a `paracopyright' measure. In this respect, then, the constitutional basis for legislating is the commerce clause, not the `copyright' clause.

- I might add that the terminology of `fair use' is often used in reference to a range of consumer interests in copyright law. In connection with the enactment of a `paracopyright' regime, consumers also have an important related interest in continued access, on reasonable terms, to information governed by such a regime. Protecting that interest, however denominated, also falls squarely within the core jurisdiction of our Committee.

- We thus were pleased to see that the conference report essentially adopts the approach recommended by our Committee with respect to section 1201. Let me describe some of the most important features of Title I.

- Section 1201(a)(1), in lieu of a new statutory prohibition against the act of circumvention, creates a rulemaking proceeding intended to ensure that persons (including institutions) will continue to be able to get access to copyrighted works in the future. Given the overall concern of the Committee that the Administration's original proposal created the potential for the development of a `pay-per-use' society, we felt strongly about the need to establish a mechanism that would ensure that libraries, universities, and consumers generally would continue to be able to exercise their fair use rights and the other exceptions that have ensured access to works. Like many of my colleagues in the House, I feel it will be particularly important for this provision to be interpreted to allow individuals and institutions the greatest access to the greatest number of works, so that they will be able to continue exercising their traditional fair use and other rights to information.

- Under section 1201(a)(1)(C), the Librarian of Congress must make certain determinations based on the recommendation of the Register of Copyrights, who must consult with the Assistant Secretary of Commerce for Communications and Information before making any such recommendations, which must be made on the record. As Chairman of the Committee on Commerce, I felt very strongly about ensuring that the Assistant Secretary would have a substantial and meaningful role in making fair use and related decisions, and that his or her views would be

- made a part of the record. Given the increasingly important role that new communications devices will have in delivering information to consumers, I consider it vital for the Register to consult closely with the Assistant Secretary to understand the impact of these new technologies on the availability of works to information consumers and to institutions such as libraries and universities. As the hearing record demonstrates, I and many of my colleagues are deeply troubled by the prospect that this legislation could be used to create a `pay-per-use' society. We rejected the Administration's original proposed legislation in large part because of our concern that it would have established a legal framework for copyright owners to exploit at the expense of ordinary information consumers. By insisting on a meaningful role for the Assistant Secretary and by ensuring that a court would have an opportunity to assess a full record, we

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believe we have established an appropriate environment in which the fair use interests of society at large can be properly addressed.

- Sections 1201(a)(2) and (b)(1) make it illegal to manufacture, import, offer to the public, provide, or otherwise traffic in so-called `black boxes'--devices with no substantial non-infringing uses that are expressly intended to facilitate circumvention of technological measures for purposes of gaining access to or making a copy of a work. These provisions are not aimed at widely used staple articles of commerce, such as the consumer electronics, telecommunications, and computer products--including videocassette recorders, telecommunications switches, personal computers, and servers--used by businesses and consumers everyday for perfectly legitimate purposes.

- Section 1201(a)(3) defines `circumvent a technological protection measure,' and when a technological protection measure `effectively controls access to a work.' As reported by the Committee on the Judiciary, the bill did not contain a definition of `technological protection measure.' The Committee on Commerce was concerned that the lack of such a definition could put device and software developers, as well as ordinary consumers, in an untenable position: the bill would command respect for technological measures, but without giving them any guidance about what measures they were potentially prohibited from circumventing. Given that manufacturers could be subject to potential civil and criminal penalties, the Committee felt it was particularly important to state in our report that those measures that would be deemed to effectively control access to a work would be those based on encryption, scrambling, authentication, or some other measures which requires the use of a `key' provided by a copyright owner to gain access to a work. Measures that do not meet these criteria would not be covered by the legislation, and thus the circumvention of them would not provide a basis for liability.

- Section 1201(b)(2) similarly defines `circumvent protection afforded by a technological measure,' and when a technological measure `effectively protects a right of a copyright owner under title 17, United States Code.' In our Committee report and in my own floor statement accompanying passage of the original House bill, I felt it was important to stress in this context as well those measures that would be deemed to effectively control copying of a work would be those based on encryption, scrambling, authentication, or some other measure which requires the use of a `key' provided by a copyright owner. The inclusion in the conference report of a separate new provision dealing with the required response of certain analog videocassette recorders to specific analog copy

- protection measures extends this scope, but in a singular, well-understood, and carefully defined context.

- Section 1201(c)(3) provides that nothing in section 1201 requires that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computer product provide for a response to any particular technological measure, so long as the device does not otherwise violate section 1201. With the strong recommendation of my Committee, the House had deleted the `so long as' clause as unnecessary and potentially circular in meaning. However, with the addition by the conferees of new subsection (k), which mandates a response by certain devices to certain analog protection measures, the `so long as' clause of the original Senate bill finally had a single, simple, and clear antecedent, and thus was acceptable to me and my fellow House conferees.

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- If history is a guide, someone may yet try to use this bill as a basis for filing a lawsuit to stop legitimate new products from coming to market. It was the Committee's strong belief—

[Page: E21368]

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

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

- Based on prior experience and the extensive hearing record, the Committee also was concerned that new technological measures and systems for preserving copyright management information might cause 'playability' problems. For example, the Committee learned that, as initially proposed, a proprietary copy protection scheme that is today widely used to protect analog

- motion pictures could have caused significant viewability problems, including noticeable artifacts, with certain television sets until it was modified with the cooperation of the consumer electronics industry. Concerns were expressed that H.R. 2281 could be interpreted to require consumer electronics manufacturers to design their devices not only so that they would have to respond to such similarly flawed schemes, but also that they, and others, would be prevented b\ the proscriptions in the bill from taking necessary steps to fix such problems.

- As advances in technology occur, consumers will enjoy additional benefits if devices are able to interact, and share information. Achieving interoperability in the consumer electronics environment will be a critical factor in the growth of electronic commerce. Companies are already designing operating systems and networks that connect devices in the home and workplace. In the Committee's view, manufacturers, consumers, retailers, and professional servicers should not be prevented from correcting an interoperability problem or other adverse effect resulting from a technological measure causing one or more devices in the home or in a business to fail to interoperate with other technologies. Given the multiplicity of ways in which

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products will interoperate, it seems probable that some technological measures or copyright management information systems might cause playability problems.

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

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

- I was particularly pleased that the Senate conferees shared our Committee's assessment of the importance of addressing the playability issue and of encouraging all interested parties to strive to work together through a consultative approach before new technological measures are introduced

- in the market. As the conferees pointed out, one of the benefits of such consultation is to allow the testing of proposed technologies to determine whether they create playability problems on the ordinary performance of playback and display equipment, and to thus be able to take steps to eliminate or substantially mitigate such adverse effects before new technologies are introduced. As the conferees recognized, however, persons may choose to implement a new technology without vetting it through an inter-industry consultative process, or without regard to the input of the affected parties. That would be unfortunate.

- In any event, however a new protection technology or new copyright management information technology comes to market, the conferees recognized that the technology might materially degrade or otherwise cause recurring appreciable adverse effects on the authorized performance or display of works. Thus, with our Committee's encouragement, the conferees explicitly stated that makers or servicers of consumer electronics, telecommunications, or computing products who took steps solely to mitigate a playability problem (whether or not taken in combination with other lawful product modifications) shall not be deemed to have violated either section 1201(a) or section 1201(b). Without giving them that absolute assurance, we felt that the introduction of new products into the market might be stifled, or that consumers might find it more difficult to get popular legitimate products repaired.

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

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

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

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

[Page: E21369]

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

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

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programmer's channel.

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

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

[Page: E2139]

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HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) [x] 2002

Document No. 75

HeinOnline -- 4 Bernard D. Reams, Jr., Law of E-SIGN: A Legislative History of the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 (2000) [xi] 2002