

107TH CONGRESS
2D SESSION

H. R. 5522

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

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 2, 2002

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

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 “Digital Choice and
5 Freedom Act of 2002”.

6 **SEC. 2. FINDINGS.**

7 The Congress makes the following findings:

8 (1) The law of copyright is often described as
9 a “difficult balance between the interests of authors
10 . . . in the control and exploitation of their writings

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

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

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

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

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

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

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

23 (7) Contrary to the intent of Congress, section
24 1201 of title 17, United States Code, has been inter-
25 preted to prohibit all users—even lawful ones—from

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

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

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: “and 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 such performance or display is not public.

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 or musi-
11 cal work, or a dramatic work, motion picture, or
12 other audiovisual work, in whole or in part in a dig-
13 ital or 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 form whereby the images and sounds are
17 visible or audible, or retrieves or accesses copy-
18 righted works in digital form and transfers or makes
19 available for transfer such works to such hardware
20 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 where the owner of a particular copy or phono-
 10 record of a work in a digital or other nonanalog format,
 11 or any person authorized by such owner, sells or otherwise
 12 disposes of the work by means of a transmission to a sin-
 13 gle recipient, if the owner does not retain his or her copy
 14 or phonorecord in a retrievable form and the work is sold
 15 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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