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WIPO COPYRIGHT TREATY (WCT) (1996) AND WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT) (1996)

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Mr. HELMS, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 105–17]

The Committee on Foreign Relations, to which was referred the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms Treaty, done at Geneva on December 20, 1996, and signed by the United States on April 12, 1997, having considered the same, reports favorably thereon with one reservation, two declarations and three provisos, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of ratification.

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I. PURPOSE

The World Intellectual Property Organization (WIPO) Copyright Treaty is intended to provide copyright protection for computer programs, databases as intellectual works, and digital communications, including transmission of copyrighted works over the worldwide Internet and other computer networks.

The second treaty—the WIPO Performances and Phonograms Treaty—is intended to provide protection for performers of audio

works and producers of phonograms (i.e., sound recordings), usually under "related" or "neighboring rights" theories of legal protection. (A country like the United States, however, that protects sound recordings under copyright law, may continue to use copyright law to satisfy the obligations of the Performances-Phonograms Treaty.)

II. BACKGROUND

The World Intellectual Property Organization (WIPO)—a specialized agency of the United Nations which administers most of the international treaties in the field of intellectual property (patents, trademarks, and copyrights)—convened a diplomatic conference from December 2–20, 1996, in Geneva, Switzerland, to consider three draft treaties in the field of intellectual property. Delegates representing more than 160 countries participated in the conference, which ultimately adopted two new intellectual property treaties (and postponed consideration of the third draft treaty on database protection).

The President in July 1997 submitted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty to the Senate for its advice and consent to ratification of the treaties by the United States, accompanied by recommendations for implementing legislation.

The WIPO Copyright Treaty originated in a WIPO work program to update the major international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). This work program started in 1989 and included discussion of the relevant copyright issues by seven Committees of Experts. This process was known as the "Berne Protocol," since it was conceived as a mechanism to modernize the Berne Convention (last revised in 1971) without engaging in a full revision of the Convention. The original purpose was to make explicit in the Berne Convention that computer programs and databases are protected as copyright subject matter, and generally to update the Convention concerning use of copyrighted works in digital, electronic environments.

Initially, the United States sought to have updated protection for sound recordings included in the "Berne Protocol" process. The European Union and many other countries strenuously resisted inclusion of sound recording protection because sound recordings are not copyright subject matter under their laws nor, they insisted, under the Berne Convention. The majority of countries protect sound recordings under so-called "neighboring" or "related" rights. The principal neighboring rights convention is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (known as the "1961 Rome Convention" or the "Neighboring Rights Convention"). The United States is not a member of the 1961 Rome Convention on neighboring rights. The United States adheres to a more narrow sound recording treaty—the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms ("Geneva Phonograms Treaty") (Geneva, 1971).

The European Union's viewpoint prevailed: the Berne Convention could not be the vehicle for improved international protection

for sound recordings since a majority of Berne States do not protect sound recordings under copyright law. These countries were unwilling to change their theoretical basis for protecting sound recordings or agree to an optional interpretation that sound recordings are copyright subject matter under the Berne Convention.

Consequently, in 1992 a decision was made to split the Berne Protocol process into two phases: an update of copyright provisions, and the preparation of a possible "new instrument" (i.e., treaty) on the protection of the rights of performers and producers of phonograms. ("Phonograms" is the international term commonly used to refer to protection of sound recordings). The issues relating to the "new instrument" were considered by six Committees of Experts. This dual copyright and "new instrument" work program culminated in adoption of two new treaties.

III. Summary

A. THE WIPO COPYRIGHT TREATY

The WIPO Copyright Treaty is a special copyright agreement updating the Berne Convention. The treaty does not specify under which intellectual property law protection must be extended. Countries are free to legislate protection under copyright, neighboring rights, or possibly misappropriation theories of law.

The major policy issues that arose at the 1996 Diplomatic Conference in the case of the Copyright Treaty were: 1) the liability of on-line service providers and other communications entities that provide access to the Internet; and 2) the scope of the reproduction right as applied to copying of data transmitted over the Internet.

The Copyright Treaty issues were resolved by two, separate "agreed statements" of the participating States: 1) that mere provision of communications-Internet physical facilities (i.e., wires, telephone lines, modems, and other communications devices) does not constitute infringement; and 2) that existing Article 9 of the Berne Convention—the reproduction right—applies to the use of works in digital form and that storage of a protected work in digital form in an electronic medium constitutes a reproduction. However, as part of a compromise, the actual article on the reproduction right was dropped from the Copyright Treaty.

The WIPO Copyright Treaty is a new treaty, but it also effectively updates the 1971 Paris version of the Berne Convention by providing strong links to the Berne Convention and by incorporating Berne articles by reference.

For countries already bound by the Berne Convention, the new Copyright Treaty is in the nature of a special agreement within the meaning of Article 20 of Berne. Under Article 20, such special agreements are permitted provided they improve protection for authors of copyrighted works or contain provisions not inconsistent with Berne obligations. The WIPO Copyright Treaty increases protection for authors.

Non-Berne countries may adhere to the new treaty only by agreeing to comply with the substantive articles of the 1971 Paris version of Berne, i.e., Articles 1-21 and the Appendix for Developing Countries. In effect, the WIPO Copyright Treaty legally binds non-Berne adhering countries to apply the Berne Convention, but such

countries do not become dues-paying, voting members of the Berne Union.

In addition to requiring the adherents to comply with Berne's substantive articles, Article 3 of the new treaty explicitly incorporates Berne Articles 2-6 [1] and requires application of Article 18. Berne Article 18 essentially requires some form of retroactive protection (perhaps pursuant to a bilateral agreement) for works that entered the public domain of a new member before adherence to the Berne Convention, but remain under copyright in the country of origin.

1. Subject Matter Provisions

Computer programs. The treaty makes clear that computer programs are protected as literary works under Article 2 of the Berne Convention, whatever may be the mode or form of their expression (Art. 4).

Databases. The treaty makes clear that the parties must accord copyright protection to databases that constitute "intellectual creations," i.e., works in which the selection or arrangement of the content is the result of intellectual effort. The compilation of the content (or data) is protected as copyright subject matter, but protection does not extend to the content itself (unless the content is independently a work of the intellect, in which case it enjoys a separate copyright) (Art. 5).

2. New or Clarified Exclusive Rights

Reproduction right: No new Treaty article. The most contentious copyright issue at the WIPO Diplomatic Conference related to a draft article dealing with the reproduction right and its application to digital or electronic formats. Internet service providers, telephone companies, and other telecommunications entities generally objected to application of the reproduction right to indirect or temporary copying by computers transferring files on the Internet and other computer networks. In the end, draft Article 7 on the reproduction right was dropped entirely from the text of the Copyright Treaty. The Diplomatic Conference, however, adopted an "agreed statement" concerning the existing Article 9 of Berne.

Public distribution right. Authors enjoy the exclusive right of authorizing the making available to the public of copies of their works (Art. 6(1)). The Treaty permits, but does not obligate, the parties

[1] Berne Article 2 specifies the subject matter protected ("literary and artistic works" in general; specific categories of works are listed). Berne Article 2*bis* allows national legislation to exclude protection for political and legal speeches, and to allow fair use of lectures, addresses and similar works by the press and media, subject to the right of the author to copyright a collection of these works. Berne Article 3 establishes the highly important rules concerning eligibility to claim protection under the Convention, usually based on nationality of the author or place of first publication (so-called "points of attachment"). Berne Article 4 establishes special eligibility rules for cinematographic works (usually the place where the author's production facilities are headquartered or the author's habitual residence in a member country) and works of architecture (the Berne country where the building is located). Berne Article 5 prohibits formalities on the enjoyment or exercise of rights, establishes that protection must be extended to eligible foreigners based on the principle of national treatment, and establishes rules defining the "country of origin" and provides that protection in the "country of origin" is ordinarily governed by national law (i.e., the rights granted authors by the Berne Convention do not have to be applied in the country of origin). Berne Article 6 permits members to retaliate against (i.e., deny protection for works of) nationals of non-members who fail to provide adequate protection for works of Berne member nationals, even though the work is first published in a Berne member country and would otherwise be eligible for protection under the Convention.

to limit the public distribution right by the "first sale" or "exhaustion of rights" doctrines.

Rental right. Authors of computer programs, cinematographic works, and works embodied in phonograms (which works are determined by national law in the case of phonograms) enjoy a generally exclusive right of authorizing the commercial rental of these works (Art. 7(1)).

There are three exceptions to the exclusive right. (i) In the case of computer programs, the right does not apply where the program itself is not the essential object of the commercial rental. (ii) In the case of cinematographic works, the right does not apply unless commercial rental in a given country has led to widespread unauthorized reproduction of copies, which materially impairs the right of reproduction. (iii) As a concession to Japan, if a country's law in effect on April 15, 1994 (the date the GATT Agreement was adopted) provides only a right of equitable remuneration for rental of works in phonograms, that remuneration right satisfies the Treaty obligation as long as there is no "material impairment" of the exclusive right of reproduction.

Public communication right. Authors enjoy the exclusive right generally of authorizing any communication to the public by wire or wireless means, if the public can access the communication at different times and places (Art. 8). In effect, this amounts to a transmission right, which extends to digital on-line and interactive communications, as well as analog communications. The reference to individual choice of reception is intended to exclude broadcasting, a right which remains governed by the existing Berne Convention. Also, the public communication right of the new Treaty explicitly cannot prejudice the existing public performance, broadcasting, and communication rights of authors as set out in Berne Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1).

3. Limitations on Rights

In addition to the limitations to the exclusive rights expressed in the grant of the right, the Copyright Treaty permits two general limitations on the rights.

Article 2 provides that "[c]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." This limitation on the scope of copyright reflects the well-settled principle known as the "idea-expression dichotomy"—copyright protects against copying of original expressions but does not inhibit copying of the ideas, concepts, methods, etc. embodied in the expression of the idea, concept, or method.

Article 10 allows each Contracting Party to legislate limitations or exceptions to the Treaty rights "in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." This general limitation would presumably justify the limitations and exceptions of existing United States law and would permit additional limitations or exceptions that do not conflict with the normal market for a work and do not "unreasonably" harm the interests of the author.

The Diplomatic Conference also adopted an "agreed statement" concerning Article 10 that has three main points. Contracting Par-

ties may extend into the digital environment any existing limitations and exceptions that have been considered acceptable under the Berne Convention. They may also devise new exceptions and limitations "that are appropriate in the digital network environment." Finally, the Conference expressed an "understanding" that Article 10(2) of the Copyright Treaty "neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."

4. Term of Protection for Photographs

Only one article of the Copyright Treaty deals with duration of protection. Article 9 obligates a Contracting Party generally to apply the standard term of life of the author plus 50 years to protection for photographic works. (The term of copyright for works other than photographs would remain controlled by Article 7 of the Berne Convention. The standard term is life of the author plus 50 years after his or her death.) This provision improves the protection accorded photographs under the Berne Convention, which permits a term as short as 25 years.

5. Enforcement of Rights

The Berne Copyright Convention traditionally has not included detailed provisions regarding enforcement of rights. The 1996 Diplomatic Conference considered proposals to include detailed enforcement provisions in the Copyright Treaty, either as an Annex to the treaty or by reference to the enforcement articles of the 1994 GATT Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement). In the end, the Diplomatic Conference rejected both proposals in favor of a brief enforcement article that makes no reference to the provisions of the TRIPS Agreement.

Article 14 requires Treaty adherents to ensure that enforcement procedures exist under domestic law to permit "effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies" to deter future infringements. Paragraph (1) of Article 14 expresses the general obligation of Contracting Parties "to undertake to adopt ... the measures necessary to ensure the application of this Treaty."

6. Retroactive Application

Article 13 of the Copyright Treaty binds adherents to apply the provisions of Article 18 of the Berne Convention, which, in essence, requires some form of retroactive protection for works that might have fallen into the public domain of the new member of the Treaty but remain under copyright in the country of origin.

7. Technological Measures

The Copyright Treaty in Article 11 establishes a new kind of legal protection for authors. Treaty adherents shall provide "adequate and effective legal protection and effective legal remedies against the circumvention of effective technological measures" (that is, protection against devices or services that defeat anti-copying technologies). The obligation is expressed in general language and leaves the details of protection to national law.

8. Rights Management Information

Pursuant to Article 12, Treaty adherents must provide "adequate and effective legal remedies against any person knowingly performing" prohibited acts relating to the removal or alteration of electronic rights management information.

This obligation extends only to rights management information in electronic form. By implication, the remedies could be criminal or civil. In the case of civil remedies, protection should apply against someone who has reasonable grounds to know that he or she has engaged in a prohibited act.

"Rights management information" (RMI) means information that identifies the work, the author, the rights holder, or discloses terms and conditions concerning use of the work. The intent is to facilitate widespread use of this information by rights holders in order to make licensing of works, or permission to use works, more readily available to the public.

The Diplomatic Conference adopted an "agreed statement" concerning the interpretation of Article 12. First, the Conference expressed an "understanding" that the reference to "infringement of any right covered by this Treaty or the Berne Convention" encompasses both exclusive rights and rights of remuneration. As a second "understanding," the Conference stated the Contracting Parties will not use Article 12 to devise or implement RMI systems that would have the effect of imposing formalities, prohibiting the free movement of goods, or impeding the enjoyment of rights under the Treaty.

9. Administrative Provisions

Any member State of the World Intellectual Property Organization may become a party to the Copyright Treaty (Art. 17). The Treaty enters into force three months after 30 States ratify or accede to it (Art. 20). No reservations are permitted, that is, a country must accept the obligations of the entire treaty and cannot decline to be bound by certain provisions (Art. 22).

Article 15 establishes an "Assembly" of the member States that provides some organizational structure for dealing with future questions about maintenance, development, or revision of the Treaty (Art. 15). The Assembly meets in regular session once every two years upon convocation by the Director General of WIPO.

The International Bureau of WIPO performs any administrative tasks concerning the Treaty (Art. 16).

B. THE WIPO PERFORMANCES AND PHONOGRAMS TREATY

The WIPO Performances and Phonograms Treaty is a new treaty, which has a few links to the existing 1961 Rome Convention. In contrast, however, to the approach taken in the WIPO Copyright Treaty (where adherents must apply the substantive articles of the 1971 Paris Act of the Berne Convention), adherents to the Performances-Phonograms Treaty are not required to apply the 1961 Rome Convention, unless they are already members of that convention.

Adherents to the Performances-Phonograms Treaty are required to promise that its provisions "shall in no way affect the protection of copyright in literary and artistic works," (Art. 1(2)) nor have any

connection with or prejudice any rights and obligations under any other treaties (Art. 1(3)).

The Diplomatic Conference also adopted an agreed interpretation with reference to Article 1 concerning the relationship between rights in phonograms under the Treaty and copyright in works embodied in the phonograms. The States agreed that where permission to use a phonogram is needed from both the author of a work embodied therein and a performer or producer, the need to obtain the author's permission does not cease to exist because permission is also required from the performer/producer, and vice-versa. This interpretative understanding merely confirms that copyright rights and related rights are separate and may be held by different rights holders. Where there are different rights holders, permission from one is not sufficient to authorize use of the phonogram.

The Performances-Phonograms Treaty creates new rights for performers and producers of sound recordings without specifying the theory of law under which the rights are enjoyed. That is, a country may provide the protection specified in the Treaty under "related" or "neighboring" rights, under copyright, or a *sui generis* law.

If existing patterns of protection for sound recordings are maintained, the majority of the countries will extend protection through related rights laws. The United States presumably will continue to rely upon copyright law as the primary vehicle for sound recording protection, supplemented by criminal penalties for knowing infringements for purposes of commercial gain. In addition to federal law, the United States may rely in part on state statutory and common law protection to satisfy some treaty obligations.

1. National Treatment

Article 4 of the Treaty obliges a Party to accord the same treatment to foreigners that the Party accords to its own nationals with regard to the exclusive rights specifically granted and the right to equitable remuneration provided by Article 15, except where a reservation is made concerning the remuneration right of Article 15. In that case, other countries are not bound to grant a right of equitable remuneration for the broadcast or communication to the public of phonograms (in essence, the public performance of sound recordings) to the nationals of the country invoking the reservation. Other than in the case of this exception, foreigners must be granted the same rights as citizens (nationals).

The national treatment article represents an enhanced level of international protection for sound recordings since the 1961 Rome Convention permitted several reservations rather than just one reservation.

2. Beneficiaries of Protection

Performers and producers of phonograms who are nationals of other Parties to the Treaty must be accorded the protection granted by the Treaty (Art. 3(1)).

The term "national" means those phonogram performers/producers who meet the eligibility criteria of the 1961 Rome Convention based on the legal fiction that all members of the Performances-Phonograms Treaty are also members of the 1961 Rome Convention (Art. 3(2)). If a reservation has been made under Rome Article

5(3) that a State will not apply either the criterion of publication or the criterion of fixation to establish eligibility of a producer, then Article 3(3) of the Performances and Phonograms Treaty permits a similar declaration for purposes of this Treaty. The Executive requested such a reservation for the United Sates.

3. Term of protection

The rights of performers and producers of phonograms must be protected generally for a minimum of 50 years computed from first fixation of the sounds in a phonogram (Art. 17).

The fixation criterion always applies in computing the term for performers (because a primary right of a performer is to authorize the first fixation of the performance in a phonogram).

In the case of producers, the 50-year term is computed from the year of publication, if the phonogram is published. If the phonogram is not published, the 50-year term for producers is computed from first fixation.

4. Exclusive rights

Performers and producers of phonograms generally enjoy the same exclusive rights under the Performances-Phonograms Treaty except that i) performers are granted moral rights and rights in unfixed performances but producers are not, and ii) technically speaking, performers are granted rights in their performances and producers are granted rights in their phonogram, that is, in the fixation of the sounds.

For clarity's sake, the Treaty sets forth performers' moral rights, their right in unfixed performances, and performers' rights of reproduction, public distribution, commercial rental, and making available to the public of fixed performances by wire or wireless means, in a separate Chapter II of the Treaty (comprising Articles 5 through 10 inclusive).

Producers are not granted moral rights or rights in unfixed performances. Producers' rights of reproduction, public distribution, commercial rental, and making available to the public of a phonogram by wire or wireless means, are set forth in a separate Chapter III of the Treaty (comprising Articles 11 through 14 inclusive).

These above-mentioned rights may be exercised separately by performers and producers. Permission from both the performer and the producer must be obtained for a third-party to reproduce, distribute, rent, or make available a phonogram (subject of course to any limitations on these rights legislated pursuant to Article 16).

Moral rights of performers. Independent of their economic rights, performers must be accorded the "moral rights" generally to be named as the performer and to object to any distortion or other modification of the performance that prejudices the performer's reputation (Art. 5).

The moral right applies both to live performances and to performances fixed in a phonogram.

After the death of the performer, the moral right must generally be maintained at least until expiration of the performer's economic rights. The post mortem moral rights can be exercised by persons or institutions authorized by the national law of the country where

protection is claimed. As an exception, however, those States, whose law at the time of ratification or accession to the Treaty does not maintain all of the moral rights after the death of the performer, are permitted to terminate some of the rights on the death of the performer (Art. 5(2)).

The details of moral rights protection are left to the national law of the country where protection is claimed (Art. 5(3)). This deference to national law may allow the United States to rely upon a patchwork of existing state laws and the federal trademark law as the legal basis for satisfying the Treaty obligation, without enacting new federal legislation.

Performers' right in unfixed performances. Performers, but not producers, are granted rights under the Treaty in "unfixed performances." This economic right basically means that performers have the right to authorize the first fixation of their performances. They also have the right to authorize the first broadcast or communication to the public of their unfixed performances (Art. 6).

This right is in addition to the qualified remuneration right of Article 15 to share in payments for the broadcast or public communication of "commercially published" phonograms.

The remaining exclusive rights apply to performances "fixed" in phonograms. Performers and producers have separate rights of reproduction, public distribution, commercial rental, and making available to the public by wire or wireless means.

Reproduction right. The reproduction right applies to direct or indirect reproduction in any manner or form of the fixed performance or the phonogram.

The Diplomatic Conference adopted an agreed interpretation of the reproduction right in Article 7 (performer's right) and Article 11 (producer's right), and of the limitations permitted by Article 16. The statement says that the Treaty's reproduction rights "fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles."

Public distribution right. Performers and producers enjoy the exclusive right of authorizing the making available to the public of copies (Arts. 8(1) and 12(1)). Like the WIPO Copyright Treaty, the Performances-Phonograms Treaty permits, but does not require, the States to limit the distribution right by the "first sale" or "exhaustion of right" doctrines (Art. 8(2)).

The Diplomatic Conference adopted an agreed interpretation concerning the word "copies" and the phrase "original and copies" where they appear in Articles 2(e) (definition of "publication"); Articles 8 and 12 (distribution rights); and Articles 9 and 13 (rental rights). "As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible copies." (Agreed Statement Concerning Articles 2(e), 8, 9, 12, and 13).

Commercial rental right. Performers and producers enjoy a generally exclusive right of authorizing the commercial rental of phonograms (Arts. 9(1) and 13(1)). This right, however, is subject

to qualification as a mere right of remuneration if on April 15, 1994, (the date the Uruguay Round Agreements under the 1994 General Agreement on Tariffs and Trade (GATT) were adopted) a country granted only a remuneration right for phonogram rentals (Art. 9(2)).

The possibility of a mere remuneration right for rentals is a concession to Japan, primarily, because their national law provides only a right of remuneration for rental of phonograms. The Treaty contains the further condition that such a country may maintain the remuneration right provided there is no "material impairment" of the reproduction right.

Making available right. Performers and producers enjoy the exclusive right of authorizing "the making available to the public" of phonograms "by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them." (Arts. 10 and 14).

This "public availability" right is in essence an interactive, on-demand public transmission right. It will apply to interactive and subscription methods of transmitting phonograms to the public, including dissemination via computer networks and other electronic means. A principal difference between the Articles 10 and 14 "public availability" right and the Articles 8 and 12 "public distribution" right is that the latter applies to distribution of copies of phonograms; the former applies to transmissions.

The existence of these separate articles, together with the somewhat ambiguous statement of the reproduction right, is arguably consistent with a view that, at the international level, public transmission of phonograms via computer networks does not amount to a public distribution of the phonograms. The validity of this viewpoint will be tested by the consensus that may develop on the meaning and legal force of the agreed statement concerning the reproduction right of Articles 7 and 11. In its domestic copyright proposals relating to the transmission of copyrighted works on computer networks, the Clinton Administration has taken the position that United States copyright law should be amended to equate public transmission with public distribution.

5. Remuneration Right for Broadcasts and Communications to the Public

Two other Treaty rights are set forth in Chapter IV of the Performances-Phonograms Treaty, which is denominated "common provisions." These are the rights of broadcasting and communication to the public for the direct or indirect use of phonograms published commercially. These rights are not strictly "exclusive" rights because they are subject to a mere right of equitable remuneration (Article 15(1)). That is, the rights holders cannot prohibit the use; the rights holders are at best entitled to compensation. Moreover, unlike the exclusive rights, these rights are subject to a single payment. The performers and producers share in the single payment, but have no separate rights to payment.

"Broadcasting" is defined as the wireless transmission for public reception of sounds or images and sounds, including transmission by satellite. The term also includes transmission of encrypted signals where the broadcasting organization provides, or consents to

the provision of, decryption devices to the public (Art. 2(f)). The definition applies both to television and radio broadcasts.

"Communication to the public" means transmission to the public of sounds by any medium other than broadcasting (Art. 2(g)).

National law may provide that either the performer, the producer, or both may claim the payment. In the absence of a contractual agreement between the performers and the producers, the national law may regulate the terms for sharing the single payment (Art. 15(2)).

Also, in a provision that permits a reservation on broadcasting-public communication rights, the Treaty allows a party to declare by notification to the Director General of WIPO that it will extend these rights i) "only in respect of certain uses," ii) "that it will limit their application in some other way," or iii) "that it will not apply these provisions at all." (Art. 15(3)). In his Transmittal Message to the Senate, the President has requested that the Senate give its consent to United States ratification of the WIPO Performances and Phonograms Treaty, while invoking the permissible reservation to the broadcasting right. If this reservation is invoked, the member State has the freedom to apply these rights to narrowly defined uses, to establish a compulsory licensing mechanism, or not grant *any* rights concerning broadcasts and communications to the public of phonograms.

The Treaty specifies that where phonograms are made available to the public by wire or wireless means in a way that permits individual access, those phonograms "shall be considered as if they had been published for commercial purposes." (Art. 15(4)).

Although a reservation is possible on the broadcasting-public communication rights, no reservation is possible on the "public availability" right of Articles 10 and 14. This means member States must provide exclusive rights where the transmission is made available on an interactive or on-demand basis. The States can elect, however, not to extend any rights to traditional broadcasts or to non-interactive public performances of phonograms (subject to the right of the performer under Article 6 to authorize the broadcast or public communication of unfixed performances). That is, the Treaty requires protection of performers against unauthorized broadcast of a live performance, but does not require protection for performers or producers against non-interactive broadcasts of phonograms (sound recordings).

The Diplomatic Conference adopted two agreed statements concerning Article 15. One statement simply recognizes the reality that the delegations to the Conference "were unable to achieve consensus on differing proposals . . . without the possibility of reservations, and have therefore left the issue to future resolution." The second statement expresses an understanding that, even though Article 15 ordinarily applies only to commercially published phonograms, member States are not prevented from granting broadcasting-public communication rights in recordings of folklore where the phonograms have not been published for commercial gain.

6. Limitations on Rights

The Performances-Phonograms Treaty permits limitations to the rights granted on the same basis as the WIPO Copyright Treaty. Any limitations or exceptions applied to copyright owners of literary and artistic works may be applied to performers and producers of phonograms (Art. 16(1)).

Member States may also legislate limitations or exceptions to the Treaty rights in "certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of phonograms." (Art. 16(2)).

The Diplomatic Conference also adopted an agreed statement to Article 16 that incorporates the Copyright Treaty's agreed statement interpreting its Article 10. This is done by stating that Article 10 of the Copyright Treaty applies *mutatis mutandis* (that is, in the same way) also to Article 16 of the Performances-Phonograms Treaty. The statement has three main points: (i) Member States may extend into the digital environment any existing limitations and exceptions that have been considered acceptable under the Berne Copyright Convention; (ii) the States may also devise new exceptions and limitations appropriate to the digital network environment; and (iii) Article 10(2) of the Copyright Treaty neither reduces nor extends the scope of limitations permitted by the Berne Copyright Convention.

7. Enforcement of Rights

The international copyright and related rights conventions have not traditionally included detailed provisions regarding enforcement of rights. The 1996 Diplomatic Conference considered proposals to include detailed enforcement provisions in the WIPO Copyright and Performances-Phonongrams treaties, either as an Annex or by reference to the enforcement articles of the 1994 GATT Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement").

In the end, the Diplomatic Conference rejected both of the detailed proposals in favor of a brief enforcement article that makes no reference to the TRIPS enforcement provisions.

Article 23 requires Treaty adherents to ensure that enforcement procedures exist under domestic law to permit "effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies" to deter future infringements (Art. 23(2)). Paragraph (1) of Article 23 expresses the general obligation to "undertake to adopt . . . the measures necessary to ensure the application of this Treaty."

8. Retroactive Application

Adherents to the Performances-Phonograms Treaty are bound to apply Article 18 of the Berne Convention, *mutatis mutandis,* to extend retroactive protection to the rights of performers and producers of phonograms (Art. 22(1)), except that a Member State can elect not to extend retroactive protection to the moral rights of performers for performances which occur before the State becomes bound by the Treaty (Art. 22(2)).

This incorporation by reference of Berne Article 18 means, in essence, that Member States must provide some form of retroactive protection for performances and phonograms that were unprotected by the new Member before it joined the Treaty, but remain under protection in the country of origin.

9. Formalities Prohibited

Article 20 requires that the "enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality." This means that no conditions such as publication in a certain country, use of a notice to claim rights, or similar requirements may be imposed in order to enjoy or exercise the rights granted by the Treaty.

10. Technological Measures

The Performances-Phonograms Treaty in Article 18 establishes a new kind of legal protection for performers and producers of phonograms. Treaty adherents shall provide "adequate and effective legal protection and effective legal remedies against the circumvention of effective technological measures" (that is, protection against devices or services that defeat anti-copying technologies). The obligation is expressed in general language and leaves the details of protection to national law.

11. Rights Management Information

Pursuant to Article 19, Treaty adherents must provide "adequate and effective legal remedies against any person knowingly performing" prohibited acts relating to the removal or alteration of electronic rights management information.

This obligation extends only to rights management information in electronic form. By implication, the remedies could be criminal or civil. In the case of civil remedies, protection should apply against someone who has reasonable grounds to know that he or she has engaged in a prohibited act.

"Rights management information" (RMI) means information that identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or discloses the terms and conditions of use. The intent is to facilitate widespread dissemination of this information by rights holders in order to make licensing of performers' or producers' rights more readily available to the public.

In another incorporation by reference from the WIPO Copyright Treaty, the Diplomatic Conference adopted the Copyright Treaty's agreed statement concerning its rights management article. That is, the agreed statement concerning Article 12 of the Copyright Treaty applies *mutatis mutandis* also to Article 19 of the Performances-Phonograms Treaty. The agreed statement includes two understandings. First, the reference to "infringement of any right covered by this Treaty" encompasses both exclusive rights and rights of remuneration. Second, the Member States will not use Article 19 to devise or implement RMI systems that would have the effect of imposing formalities, prohibiting the free movement of goods, or impeding the enjoyment of Treaty rights.

12. Audiovisual Performances Excluded

The major policy controversy concerning the Performances-Phonograms Treaty at the 1996 Diplomatic Conference was whether or not to extend rights to performances in audiovisual works such as motion pictures. The United States argued strongly against coverage of audiovisual performances, and this viewpoint prevailed at this time.

WIPO will convene a new series of meetings to explore protection of audiovisual performances. In order to create a treaty obligation in respect of audiovisual performances, a new diplomatic conference would have to be convened. The 1996 Diplomatic Conference adopted a Resolution Concerning Audiovisual Performances which recommends development of a Protocol to the WIPO Performances-Phonograms Treaty concerning audiovisual performances, with a view to adoption of a Protocol by the end of 1998.

The definition of "phonogram" embodies the decision to exclude audiovisual performances. "Phonogram" means the fixation of sounds (or a representation of sounds) other than in the form of a fixation incorporated in a cinematographic or other audiovisual work (Art. 2(b)). An agreed statement of the Diplomatic Conference clarifies that rights in a protected phonogram (a fixation of sounds) are not affected in any way, however, by incorporation of that phonogram in the soundtrack of a motion picture or other audiovisual work (Agreed Statement concerning Article 2(b)). That is, if a pre-existing sound recording is re-recorded on the soundtrack of a motion picture, the rights of the performers and producers of the sound recording (phonogram) remain protected by the Treaty, even though the Treaty otherwise excludes protection for performances in audiovisual works.

13. Administrative Provisions

Any WIPO member may become a party to the Performances and Phonograms Treaty (Art. 26(1)). No reservations are permitted, except for a reservation concerning the remuneration right for broadcasting and public communications (Art. 21). In addition to the Article 15(3) reservation, however, the possible reservations concerning the publication and fixation eligibility criteria of the 1961 Rome Convention are carried over into the Performances-Phonograms Treaty pursuant to Article 3(3). Subject to this one exception, a country must accept the obligations of the entire Treaty and cannot decline to be bound by certain provisions (Art. 27).

Article 24 establishes an "Assembly" of the member States in order to provide some organizational structure for dealing with future questions about maintenance, development, or revision of the Treaty (Art. 24(2)). The Assembly meets in regular session once every two years, upon convocation by the Director General of WIPO (Art. 24(4)). The International Bureau of WIPO performs any administrative tasks concerning the Treaty (Art. 35).

IV. Entry into Force and Termination

A. ENTRY INTO FORCE

Both Conventions enter into force three months after 30 instruments of ratification have been deposited with the Director General of WIPO.

B. TERMINATION

Both Conventions permit for withdrawal by written notification to the Director General of WIPO. Withdrawal shall be effective one year after the date of such notification is received by the Director General.

V. Committee Action

The Committee on Foreign Relations held a public hearing on the proposed treaties on September 10, 1998 (a transcript of the hearing can be found in the annex to this report). The Committee considered the proposed Treaties on October 14, 1998 and ordered the proposed Treaties favorably reported with the recommendation that the Senate give its advice and consent to the ratification of the proposed Convention subject to one reservation, two declarations, and three provisos.

VI. Committee Comments

The Committee on Foreign Relations recommends favorably the proposed Treaties. On balance, the Committee believes that the proposed Treaties are in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification, subject to the conditions contained in the resolution of ratification. Several issues did arise in the course of the Committee's consideration of the Treaties, and the Committee believes that the following comments may be useful to Senate in its consideration of the proposed Treaties and to the State Department.

A. RELATION TO IMPLEMENTING LEGISLATION

According to testimony before the Committee by Alan P. Larson, the Assistant Secretary of State for Economic Affairs, the United States core copyright industry (including the motion picture industry, publishers, software producers, and the music and recording industry) now accounts for as much as 3.6 percent of the nation's gross domestic product. Industry statistics indicate that some 3.5 million Americans are employed in this sector. An increasing portion of this economic activity is a result of foreign sales and exports. In 1996 foreign sales and exports accounted for $60.18 billion according to industry statistics. The impact of weak foreign copyright laws that result in piracy and other copyright infringements is not insignificant.

These Treaties provide for broad-based principles that attempt to standardize intellectual property protections relating to digital communications worldwide. Establishment and enforcement of clear rules for commerce in this area will facilitate and perhaps

stimulate the further development of U.S. computer and digital communication industry.

In order to start this process the Administration, the Congress, and various interested sectors of the economy have engaged in negotiations resulting in comprehensive copyright legislation (H.R. 2281) during the past year. The bill was passed by the House and Senate and a conference has been approved by both bodies and is awaiting the President's signature. The negotiations commenced when consensus was reached that simply ratifying these Treaties without a simultaneous review and redrafting of U.S. law in this area would not advance fair and comprehensive intellectual property protections that balanced the interests of various sectors of this growing copyright industry.

This need for such clarification was anticipated during the Diplomatic Conference that adopted the WIPO Treaties. The Conference adopted an "agreed statement" regarding Article 8 of the WIPO Copyright Treaty, which states that Internet service providers (ISPs) should not be held liable when they merely provide "physical facilities for enabling or making a communication." In order to address this issue, the WIPO Treaties implementing legislation (H.R. 2281) has embodied within it a compromise regarding the issue of copyright infringement liability for ISPs. The legislation establishes a clear legal framework for the rights and responsibilities of ISPs, telephone companies and copyright holders.

In order to ensure that the Treaties are directly linked to this legislation, the Committee's resolution of ratification contains a proviso that prohibits the United States from taking the final step in the ratification process—the deposit of instruments of ratification for these Treaties—until the President has signed into law a bill that implements the Treaties. The proviso stipulates that a bill implementing the Treaties must include clarifications to United States law regarding infringement liability for on-line service providers, such as contained in H.R. 2281.

The Committee urges the Executive to promote this compromise legislation as a model for domestic legislation by other Parties to the WIPO Treaties. The Committee's resolution of ratification therefore requires the President to report annually on U.S. efforts to encourage enactment of such legislation as part of the Treaty ratification and implementation process.

B. IMPLEMENTATION AND ENFORCEMENT OF THE TREATIES

The Committee is concerned in general that once ratification and entry into force of any treaty is secured, there is little interest in ensuring full enforcement of treaty commitments. Likewise, the Committee believes that simply ratifying the proposed Treaties will do little to curb piracy of copyrighted material unles there is also a serious commitment to enforce the obligations contained in the Treaties. The impact of the Treaties therefore will depend on whether the Parties implement and enforce fully their obligations under the Treaties.

The Committee therefore supports ratification of the Treaties, but cautions this act will be largely symbolic unless Parties to the Convention both enact and enforce domestic laws that fully implement the requirements contained in the Treaties. In addition, these

Treaties will do little to encourage copyright protection in countries that are not Parties to the Treaties, such as the People's Republic of China.

In order to better monitor progress of other Parties to the Treaties, the Committee has included a reporting requirement in the resolution of ratification. As a condition of ratification the President must inform the Committee annually of the status of ratification by other countries, domestic legislation enacted by other countries, enforcement of this legislation, any future negotiations, and efforts by the United States to expand membership in the Treaties. The Committee expects that the Administration will take this reporting requirement seriously and respond to each provision of the reporting requirement directly.

C. NO RESERVATIONS CLAUSES

Article 22 of the Copyright Treaty prohibits reservations to the Treaty and Article 21 of the Performances and Phonograms Treaty prohibits reservations except in one narrow context. While the Committee recognizes that an abuse of reservations can be detrimental to enforcement of the conditions agreed to during a treaty negotiation, the Committee continues to be concerned by the increasingly common practice of agreeing to such "no reservations" clauses, which impinge upon the Senate's prerogatives. The Committee questions whether there is any substantive evidence that other Parties would place numerous or burdensome reservations on the treaty so as to undermine U.S. interests.

The Committee's recommended Resolution of Ratification contains a declaration that it is the Sense of the Senate that such "no reservations" and "limited reservations" provisions can inhibit the Senate in its Constitutional obligation of providing advice and consent, and approval of this Treaty should not be read as a precedent for approval of other treaties containing such a provision.

Although the Committee has determined that this treaty is beneficial to the interests of the United States and should be approved notwithstanding these provisions, the Committee will continue to object to the inclusion of such provisions in U.S. Treaties. The Committee repeatedly has expressed in report language its concern that such "no reservations" provisions are problematic to Senate ratification, yet there has been no apparent decline in the inclusion of such provisions in treaties signed by the United States, nor any attempt to consult with the Committee prior to the inclusion of such provisions.

VII. Explanation of Proposed Convention

For a detailed article-by-article analysis of the proposed Convention, see the letter of submittal from the Secretary of State, which is set forth at pages V-X of Treaty Doc. 105–17.

VIII. Text of the Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the World Intellectual Property Organization Copyright Treaty and the World Intellectual Property Organization Performances and Phonograms

Treaty, done at Geneva on December 20, 1996, and signed by the United States on April 12, 1997 (Treaty Doc. 105–17), subject to the reservation of subsection (a), the declarations of subsection (b), and the provisos of subsection (c).

(a) RESERVATION.—The advice and consent of the Senate to the WIPO Performances and Phonograms Treaty is subject to the following reservation, which shall be included in the instrument of ratification and shall be binding on the President:

REMUNERATION RIGHT LIMITATION.—Pursuant to Article 15(3) of the WIPO Performances and Phonograms Treaty, the United States will apply the provisions of Article 15(1) of the WIPO Performances and Phonograms Treaty only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.

(b) DECLARATIONS.—The advice and consent of the Senate is subject to the following declaration:

(1) LIMITED RESERVATIONS PROVISIONS.—It is the Sense of the Senate that a "limited reservations" provision, such as that contained in Article 21 of the Performances and Phonograms Treaty, and a "no reservations" provision, such as that contained in Article 22 of the Copyright Treaty, have the effect of inhibiting the Senate in its exercise of its constitutional duty to give advice and consent to ratification of a treaty, and the Senate's approval of these treaties should not be construed as a precedent for acquiescence to future treaties containing such provisions.

(2) TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The advice and consent of the Senate is subject to the following provisos:

(1) CONDITION FOR RATIFICATION.—The United States shall not deposit the instruments of ratification for these Treaties until such time as the President signs into law a bill that implements the Treaties, and that includes clarifications to United States law regarding infringement liability for on-line service providers, such as contained in H.R. 2281.

(2) REPORT.—On October 1, 1999, and annually thereafter for five years, unless extended by an Act of Congress, the President shall submit to the Committee on Foreign Relations of the Senate, and the Speaker of the House of Representatives, a report that sets out:

(A) RATIFICATION.—a list of the countries that have ratified the Treaties, the dates of ratification and entry into force for each country, and a detailed account of U.S.

efforts to encourage other nations that are signatories to the Treaties to ratify and implement them.

(B) DOMESTIC LEGISLATION IMPLEMENTING THE CONVENTION.—a description of the domestic laws enacted by each Party to the Treaties that implement commitments under the Treaties, and an assessment of the compatibility of the laws of each country with the requirements of the Treaties.

(C) ENFORCEMENT.—an assessment of the measures taken by each Party to fulfill its obligations under the Treaties, and to advance its object and purpose, during the previous year. This shall include an assessment of the enforcement by each Party of its domestic laws implementing the obligations of the Treaties, including its efforts to:

(i) investigate and prosecute cases of piracy;

(ii) provide sufficient resources to enforce its obligations under the Treaties;

(iii) provide adequate and effective legal remedies against circumvention of effective technological measures that are used by copyright owners in connection with the exercise of their rights under the Treaties or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the copyright owners concerned or permitted by law.

(D) FUTURE NEGOTIATIONS.—a description of the future work of the Parties to the Treaties, including work on any new treaties related to copyright or phonogram protection.

(E) EXPANDED MEMBERSHIP.—a description of U.S. efforts to encourage other non-signatory countries to sign, ratify, implement, and enforce the Treaties, including efforts to encourage the clarification of laws regarding Internet service provider liability.

(3) SUPREMACY OF THE CONSTITUTION.—Nothing in the Convention requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

APPENDIX

THE WORLD INTELLECTUAL PROPERTY ORGANIZATION COPYRIGHT TREATY AND WORLD INTELLECTUAL PROPERTY ORGANIZATION PERFORMANCES AND PHONOGRAMS TREATY; (TREATY DOC. 105–17)

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THE WORLD INTELLECTUAL PROPERTY ORGANIZATION COPYRIGHT TREATY AND WORLD INTELLECTUAL PROPERTY ORGANIZATION PERFORMANCES AND PHONOGRAMS TREATY; TREATY DOC. 105–17

THURSDAY, SEPTEMBER 10, 1998

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room 419, the Dirksen Senate Office Building, Hon. Chuck Hagel, presiding.

Present: Senators Hagel, Sarbanes and Feinstein.

Senator HAGEL. Good morning. The Foreign Relations Committee meets today to consider two Intellectual Property Treaties negotiated under the auspices of the World Intellectual Property Organization, known as WIPO, in December 1996.

Both treaties were submitted to the Senate as a package in July 1997 and were referred to the Foreign Relations Committee. Legislation that would amend U.S. Law to bring the United States fully into compliance with the treaties and resolve a number of related copyright issues that have arisen in the new digital environment was passed unanimously by the Senate and is now pending in the House of Representatives.

The first treaty, the WIPO Copyright Treaty, updates existing international copyright obligations and covers copyright protection for computer programs, data bases, and digital communications, including copyrighted works of the worldwide Internet and other computer networks.

The second treaty, the WIPO Performances and Phonograms Treaty, mandates new protections for performers of audio works and producers of sound recordings. Although the United States will continue to provide protection for performers and producers under U.S. Copyright law, the treaty permits countries to fulfill their treaty obligations under different legal theories.

As I suspect the witnesses today will testify, support for the treaties has been generally positive. Given that the United States copyright industry now employs some 3.5 million Americans with foreign sales and exports in 1996 totaling $60 billion, the impact of copyright infringement is quite significant.

These treaties attempt to standardize intellectual property protections relating to digital communications worldwide. Establishment and enforcement of clear rules for commerce in this area will

facilitate the further development of the U.S. Computer and digital communication industry.

As with other investment treaties, both treaties are based on national treatment principles which require parties to protect foreign works just as they would domestic works.

This last year of negotiations between the administration, the Congress, and the affected sectors of the economy to pass comprehensive legislation has shown that simply ratifying these treaties without a simultaneous review and redrafting of U.S. Law in this area will not advance fair and comprehensive intellectual property protections that balance the interests of various sectors of this growing industry.

For this reason, the committee has delayed consideration of the treaties while the implementing legislation has worked its way through both the Senate and the House. Rather than leave these issues for judicial review, which often takes too long and is fraught with uncertainty for conducing Internet business, the pending legislation attempts to provide clear legislative interpretation of existing protections and of potential treaty commitments.

In fact, ratification of the treaties without amending U.S. Law on issues such as the scope of rights and limitations on the rights would leave the courts with only the treaty language to determine the outcome of cases and could be an obstacle to enactment of future legislation in this area.

Such an outcome would turn the treaty-making process on its head and leave the executive branch, not the Congress, in the position of determining U.S. Law in this very important area.

Given the progress toward enactment of this legislation, the committee is commencing its consideration of these treaties today and will hear from both the administration and affected industries and academics regarding a range of issues, including the need for advanced protection of U.S. Intellectual property exported abroad; the impact of the treaties without adherence by countries like China, India, and Russia, which have long been major sources of pirating and have not signed the treaties; the prospects for ratification and enforcement of the treaties by signatories to the treaties; the means by which U.S. Industry will be able to enforce their rights under the treaties in other countries; clarification of liability for copyright infringement on the Internet; the penalties for anti-circumvention of technology designed to prevent copyright infringement; and new rights extended to producers and performers of sound recording and the compatibility of U.S. Legal protections for those individuals through copyright law with other countries' legal theories.

Senator HAGEL. On the first panel, Assistant Secretary of State Alan P. Larson will testify for the administration. Secretary Larson will be followed by a second panel, including Mr. Jack Valenti, President and Chief Executive Officer of the Motion Picture Association of America; Mr. Roy M. Neel, President and Chief Executive Office of the United States Telephone Association; Mr. Peter Jaszi, an Associate Professor of Law at the Washington College of Law of American University; and Mr. Christopher Byrne, the Director of Intellectual Property for Silicon Graphics.

Welcome, Gentlemen. We are pleased to have you here. We appreciate your time and your commitment. Before we begin the official proceedings this morning, let me express on behalf of our Committee our sympathy and express our condolences to the families, friends, and colleagues of the WIPO commissioners who were killed last week in the tragic crash of Swiss Air Flight 111.

With that, Mr. Larson, please proceed.

STATEMENT OF ALAN P. LARSON, ASSISTANT SECRETARY OF STATE FOR ECONOMIC AND BUSINESS AFFAIRS

Mr. LARSON. Thank you very much, Mr. Chairman. Mr. Chairman, I have a written statement which, with your permission, I would like to submit for the record. And also, with your permission, I would like to summarize the main points of that statement.

Senator HAGEL. They will be included in the record, Mr. Larson.

Mr. LARSON. Thank you.

Mr. Chairman, we do appreciate this opportunity to put forward the views of the administration and the Department of State on these two WIPO treaties. Let me begin with a concise declaration: the administration and the Department of State unequivocally endorse the WIPO Copyright Treaty and the WIPO Performances and Phonograms treaty.

These two treaties support two very important goals of American commercial diplomacy: first, adequate protection of intellectual property rights and, second, greater openness in the exchange of ideas, goods, and services among all nations. My testimony today is limited to the ratification of the WIPO treaties.

The Administration has submitted previously its views on aspects regarding the implementation legislation to the relevant committees, and we will work closely with the conference committee.

The WIPO treaties will be critical to ensuring that copyright regimes in all major countries adequately protect the original and creative works that enrich our cultures, broaden our scientific and technical knowledge, and inform and educate and entertain our citizens. The WIPO treaties come as close as possible to achieving an optimal balance in providing incentives for creative effort without unduly burdening the free exchange of ideas, information, or scientific research.

The need for refinement of copyright standards was recognized several years before the convening of the 1996 WIPO Diplomatic Conference in Geneva. The pace of technology was accelerating beyond the point where the courts easily could adapt traditional copyright concepts to new challenges created by the emerging digital medium.

This is not to suggest that traditional copyright concepts were inadequate, but only that there needed to be clarification and refinement of how they would apply in the digital age.

Emerging digital technology is a two-edged sword for copyright holders. The Internet and other new communications technologies are opening new avenues for rapid and cost-efficient dissemination of creative works. The same digital technology, however, provides intellectual property pirates with new tools for copying and distributing works without the authorization of the creators and owners.

The primary goal of the WIPO treaties is to fill in the gaps created by digital technology in the field of copyright protection.

Maximizing the potential of the Internet and other innovative communication technologies will require that the creators of new works in the arts and sciences be protected from copyright piracy. Without clear rules provided by the WIPO treaties, the opportunities for exchange of ideas and pursuit of knowledge will in practice be considerably reduced.

Promoting the dissemination of creative works, of course, adds to a nation's store of knowledge, and that is a laudable objective in and of itself. But there are also very direct and important commercial advantages for the United States.

As you indicated, Mr. Chairman, by any measure, U.S. Copyright-based industries comprise a considerable share of out output. Taken together, the motion picture industry, the publishers and software producers, the music recording industry, the so-called core copyright industries, in recent years have accounted for as much as 3.6 percent of our national output.

And, according to the same sources, the total contribution of all copyright industries approached 5.7 percent of national output as recently as 1996.

The copyright-based sector is one of our economy's most dynamic sectors. The value added in this sector has increased consistently since 1997. And by one recent estimate, the annual growth rate in these core copyright industries has been twice the average for the economy as a whole. As you indicated, employment growth in these industries is very important.

We think that it has grown at three times the rate of the economy as a whole. And, of course, the U.S. Is the world's largest exporter of copyright-based products.

So the continued vitality of the U.S. Copyright sector will depend on whether other countries adopt standards that deal with the copyright challenges that are posed by digital technology.

The Copyright Treaty provides protection for computer software. It protects the distribution of copyright materials though electronic networks. And it imposes legal standards for the circumvention of copyright protection technology.

The WIPO Performances and Producers Treaty brings copyright protection of sound recordings closer to the protection given other creative works such as books, films, and software.

Most of these protections are already afforded by U.S. Law. What the U.S. Needs to do is ensure that other countries provide such protection as well. But the adoption by those countries of the WIPO treaties is not likely if the U.S. Is not in a position to lead by example. And that is why we would urge the committee to do everything possible to ensure that the U.S. Quickly ratifies these WIPO treaties.

Thank you very much, Mr. Chairman. I would be happy to respond to your questions.

Senator HAGEL. Mr. Secretary, thank you. And your complete statement will be included in the record.

[The prepared statement of Mr. Larson follows:]

PREPARED STATEMENT OF ALAN P. LARSON

Mr. Chairman and Members of the Committee, thank you for this opportunity to discuss with you the views of the Department of State concerning two treaties negotiated within the World Intellectual Property Organization, or WIPO—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

Let me begin with a concise declaration: the Department of State unequivocally endorses the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The two WIPO treaties support two of the Department's major goals of commercial diplomacy: adequate protection of intellectual property protection and greater openness in the exchange of ideas, goods, and services among all nations. My testimony today is limited to the ratification of the WIPO treaties. The Administration has previously submitted its views on aspects of the implementing legislation to the relevant committees, and will work closely with the conference committee.

The protection of intellectual property rights is one of the Administration's top priorities in the field of commercial diplomacy. The WIPO treaties will be critical to ensuring that copyright regimes in all countries adequately protect the original and creative works that enrich our cultures, broaden our scientific and technical knowledge, and inform, educate and entertain our citizens. The WIPO treaties are the result of extensive negotiations and are based on the information and views receivedfrom legal scholars, representatives of various industries, and various government agencies from around the World. Their efforts have not been in vain. The WIPO treaties come as close as possible to achieving & optimal balance in providing incentives for creative effort without unduly burdening the free exchange of ideas and information or scientific research. Indeed, for reasons that I will address shortly, the opportunities for exchange of ideas and the pursuit of knowledge will be considerably lessened if the WIPO treaties are not adopted.

As already noted by others, the need for a refinement of copyright standards was recognized several years before the convening of the 1996 WIPO Diplomatic Conference in Geneva. The pace of technology was accelerating beyond the point in which courts could adapt traditional copyright concepts to new challenges created by the emerging digital medium. This is not to suggest that traditional copyright concepts were inadequate, but only that there needed to be clarification and refinement of how they would apply in the digital age.

Emerging digital technology is a two-edged sword for copyright holders. The Internet and other new communications technology are opening new avenues for rapid and cost-efficient dissemination of creative works. The same digital technology, however, provides intellectual property (IP) pirates with new tools for copying and distributing works without the creators'/owners' authorization. The primary goal of the WIPO treaties is to fill in the gaps created by digital technology in copyright protection.

The expansion of digital technology throughout all regions of the World will provide new opportunities for commercial exchange while simultaneously making it more difficult to combat intellectual property piracy. We need other countries to adopt and be required to enforce the copyright standards set forth in the WIPO treaties. The WIPO treaties are the best standards for addressing the concerns for copyright protection that have arisen with the advent of digital technology.

As I have said, digital technology will open new avenues for the dissemination of creative works. But maximizing the potential of the Internet and other innovative communication technologies will require that the creators of new works in the arts and sciences be protected fromcopyright piracy. Without the clear rules provided by the WIPO treaties, the opportunities for exchange of ideas and the pursuit of knowledge will in practice be considerably reduced.

Promoting the dissemination of creative works that enrich cultures and add to a nation's store of knowledge is a laudable objective in and of itself. But there are direct commercial advantages for the U.S., especially in terms of exports and employment, that warrant U.S. support for the WIPO treaties. By any measure, U.S. copyright-based industries comprise a considerable share of the U.S. economy's output. Taken together, the motion picture industry, publishers, software producers, and the music and recording industry-the so-called "core" copyright industries-in recent years have accounted for as much as 3.6% of the nation's GDP, according to some industry studies. According to the same sources, the total contribution of all copyright industries approached 5.7% of GDP as recently as 1996.

But even more important, similar reports suggest that the copyright-based sector is one the U.S. economy's most dynamic. Value added measurements for the copyright sector have increased consistently since 1977. By one recent estimate, the real annual growth rate of the core copyright industries has been more than twice the rate of the overall U.S. economy; while the estimated compound annual growth rate

of the entire economy was 2.6% over the last twenty years, the rate for the core copyright industries was 5.5%. Similarly, according to the same report, copyright industries have continued to increase employment during the same period. Employment growth in the core copyright industries was nearly three times the rate for the economy as a whole.

The continued vitality of the U.S. copyright sector will depend on whether countries adopt standards that deal with the copyright challenges posed by digital technology. As already pointed out, the WIPO treaties are crucial for setting copyright standards in the digital age. The WIPO Copyright Treaty provides protection for computer software. It protects the distribution of copyright materials via electronic networks. And it imposes legal standards for the circumvention of copyright-protection technology. The WIPO Performances and Producers Treaty brings copyright protection of sound recordings closer to the protection given other creative works, such as books, films, and software. Most of these are protections already affordedby U.S. law. The U.S. needs to ensure that other countries provide such protection as well.

The U.S. has an unprecedented opportunity to help establish minimum international copyright standards. Standards which are critical for the continued vitality of U.S. copyright-based industries seeking to sell in markets overseas. But adoption of the WIPO treaties in other countries is not likely if the U.S. fails to lead by example. Therefore, I urge the Committee, in the strongest terms, to do all possible to ensure that the U.S. adopts the WIPO treaties.

I thank the Committee for providing me this opportunity to give the Department of State's views on the WIPO treaties.

Senator HAGEL. Mr. Larson, let me ask a few questions. And the questions that we do not get to this morning and questions that my colleagues might have will be sent over to your office. And we will keep the record open for a few days to allow all of my colleagues to respond as they wish.

Mr. Secretary, originally the administration had requested legislation that would just simply make minor changes to U.S. Law and would not address the question of liability for Internet copyright infringement by customers of on-line services and access providers. As you know, the pending legislation addresses these issues.

Two questions: Do you support those additional changes, proposals, in both the Senate Bill, which we have passed, as you know, and the House Bill, HR–2281, is pending with respect to the copyright liability of on-line service providers.

Mr. LARSON. Mr. Chairman, as I mentioned at the outset, we have been submitting our views into the committees that are working on the implementing legislation.

As you pointed out, as that implementing legislation has moved forward, the interested parties, the interested constituencies in the United States have been working through to refine the approaches that we take in our implementing legislation to the questions of balance that arise when you are trying to at the same time protect copyright owners and also provide for the free flow of information.

I think one important point is that the treaties themselves are providing a framework that allows us through the implementing legislation to sort out some of these details in a way that is consistent with our interests and with our traditions in the copyright area. We are very comfortable with the way that that process is moving forward.

As a formal matter, there is not an Administration position today on the precise text of the legislation that you referred to. But we are, as I said, very comfortable with the way that this dialog has moved forward as the implementing legislation has advanced.

Senator HAGEL. The second part of that, Mr. Secretary, is, aside from the formal, official position the administration might or might not take on the verbiage and the specifics, are you satisfied that the bills adequately deal with the application of traditional limitations on the rights, rights such as the free fair use first sale doctrine? In your opinion, what you know of that language, is it adequate?

Mr. LARSON. What I am very certain of, Mr. Chairman, is that the treaties themselves, which I testified on today, give us all of the latitude that we need to protect our traditional legal approaches to fair use doctrine.

I, unfortunately, am not the right person, nor am I in a position to give you an expert assessment on the implementing legislation itself that is working its way through the Congress. We are comfortable with the direction that that is going. But I do not want to be unresponsive to your questions. I am just not the right person to give you an authoritative answer.

Senator HAGEL. This will be one of those questions that your people can give a little focus to when we sent the questions over and round out the rough edges.

Mr. LARSON. Sure.

Senator HAGEL. Let me ask a more political question. And I am going to refer back to your statement.

In your statement you highlighted the growing problems of intellectual property pirates, of which we are aware. Obviously, that is why we have some urgency here to deal with the issue.

You mentioned that the treaty is an effort to increase protections to copyright owners. However, for any treaty to be effective, as you well know, it must be backed by strong political will and a commitment to enforce its provisions.

My question is this, Mr. Secretary: What efforts are being made now and will be made by the State Department to enforce existing protections internationally?

Mr. LARSON. We are very committed to enforcing existing protections. I think, with respect to the new obligations that are created by this treaty, what we want to do is to be in a position. Through our own ratification and implementation of the treaty commitments, to be able to put strong pressure on other countries to move quickly as well. Our sense is that the major industrial countries share our commitment to move forward.

We will want to work with them to make sure that they implement quickly. We also want to make sure that other countries that have signed this treaty—I understand there are some 50 who have signed these treaties—move forward in this process as quickly in addition.

There are countries, like India, which is going to be a member of this arrangement, which has an emerging film industry, and where it is going to be very important for us, for the protection of our copyright holders, to make sure that the disciplines of this agreement are enforced through law.

Needless to say, we are going to have to continue to monitor these issues all around the world. We are committed to the active and aggressive use of all of our tools, including our domestic trade

laws, to enforce the rights of our copyright holders around the world.

Senator HAGEL. Mr. Secretary, from your perspective, do you believe there has been an increase, a decrease, or about the same in the incidence of pirating?

Mr. LARSON. I think that there is a growing appreciation that property rights protection is in the interest of countries around the world, that it is part of a sensible policy of economic development. It is important for any country that wants to attract foreign investment to have a strong property rights regime domestically.

One of the things that we are finding, Mr. Chairman, is that we have more success now than we have sometimes had in the past using diplomatic and persuasive strategies, together with some of the harder-edged strategies, to persuade countries of their own national interest in adopting and enforcing strong protection of intellectual property rights.

It is interesting that some 50 countries saw it in their interest to pursue this WIPO copyright process. I have commented on other opportunities before this committee on some of the progress that we have made, led by Ambassador Barchesky, with China on copyright issues. It is never easy.

But I think the important thing is that there is progress on the international regimes, these types of WIPO treaties and so forth. And there is, I think, a growing appreciation by many countries that they have a stake, a very strong stake themselves, in doing a better job. At the State Department, we are trying to use our own diplomatic resources and the skills of our Ambassadors to bring this message home in new ways.

Senator HAGEL. Mr. Secretary, the WIPO Copyright Treaty recognizes, I believe for the first time, that computer programs are covered by the Berne Convention and incorporates these protections by reference. However, parties made an official statement, I believe, that the existing reproduction right of the Berne Convention will fully apply to the digital environment.

And the question is this: Why did the parties choose to address this issue as a statement rather than put it in the treaty text?

Mr. LARSON. Mr. Chairman, it is my understanding that in the negotiating process it proved to be too difficult and controversial to get a substantive—get a provision in the text of the treaty itself on this.

But our negotiators were able to get a footnote reference that we believe fully protects our position on this. And that, you know, after the appropriate analysis, we decided to go forward on that basis.

Senator HAGEL. Mr. Secretary, let me now ask our friend and colleague, the distinguished senior Senator from California, Senator Feinstein, who has joined us, if she has a statement.

And please proceed, Senator. It is nice to have you.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. It is nice to be here.

I just want to indicate my full support for this treaty. I think the intellectual property industries are really the growing mainstay of the American economy. And certainly for my State, California, it is an extraordinarily important industry.

I think most people perhaps do not understand how easy it is to violate copyright protection. And copyright protection is afforded in this country, but it is not in other countries, or countries like Argentina, that do not believe that such a thing should exist.

Well, passage of WIPO, the World Intellectual Properties Treaty, will in effect guarantee that the copyright protection that we afford to our record breaking industries in this nation is afforded to them throughout the world.

Our American creative industries have grown twice as fast as the rest of the United States economy from 1987 to 1994. Employment in these copyright industries has more than doubled. About 3.5 million Americans today are employed in copyright-related industries.

And the rate of employment growth is three times that of the economy as a whole. So the copyright employment now accounts for about 5.2 percent of the entire United States work force.

Our exports were more than $60 billion in 1996. That is a 13 percent gain over 1995. This outstrips foreign sales and exports of our agricultural sector and of the combined automobile and automobile parts industries. And the business software alliance reports that 50 to 60 percent of its revenues today come from overseas.

I am delighted to welcome Jack Valenti to this hearing. The entertainment industry, of which he has become a mainstay, generates employment for more than 450,000 Californians. And from 1992 to 1996, the industry's payrolls in California have increased 62 percent to $12 billion.

And purchases of goods and services in entertainment production add up to another $15.5 billion. I say these things not to be a compendium, but simply to indicate how important protection of copyright is throughout the world.

We are now in a global economy. You cannot be in a global economy unless we all play by the same rules. So protection of copyright industries, the IPR protection, is extraordinarily important.

As you know, Mr. Chairman, I also sit on the Judiciary Committee. We have looked at this treaty. I think the bugs in it have been worked out. Chairman Hatch and others have spent a great deal of time reconciling divergent points of view. And I think that we have a treaty that will stand the test of time and will provide the kind of world protection to intellectual property industries that is both warranted and deserved.

I thank you for that opportunity. And I have no questions of the distinguished Secretary.

Senator HAGEL. Senator Feinstein, thank you very much. We are trying to persuade Mr. Valenti, Senator, to look at Nebraska more favorably for movie making. It is tough.

Senator FEINSTEIN. Actually, I think all of his energies are taken up in California.

Senator HAGEL. Mr. Secretary, I have additional questions. But in the interest of time—I know you have other things to do. And we have a full panel behind you. I would move to submit the additional questions I have for the record. You and your staff can answer those, send those back up. And as I suggested, some of our colleagues may have questions, which we will keep the record open for. And they may submit them as well.

For your interest, I think it is the intent of the Chairman to try and move this at our, we believe, our final committee meeting mark-up later this month. As you know, in this town news does not stay fresh very long. We are hour to hour. So I do not know if we will have one or more meetings yet before we adjourn. But it is the intent of the chairman to move on this quickly.

I think, as well, he feels, as I said in my opening statement, that implementing legislation should accompany the treaty. And if the House can accomplish what it needs to accomplish here, then I am rather confident that we can get this out and get the Senate to pass it.

Mr. LARSON. Mr. Chairman, thank you very much for that. We will work very hard with you and the committees staff to get quick answers to any questions that members of the committee may have so that you can stick to your timetable.

And if I could just say one last comment, picking up on something that Senator Feinstein said. I do think that here the big picture is that we are achieving through these treaties the internationalization of American standards on copyright protection.

We are the world's largest exporter of copyright-based products. We have a huge commercial interest in this. And so, while there are some very important issues with respect to the domestic legislation, our sense is the same as Senator Feinstein's, that those are being worked out and that the big picture here is that we are basically internationalizing U.S. Concepts, U.S. Approaches, and U.S. Legal concepts of copyright protection to the rest of the world, which is very much in our interest. Thank you.

Senator HAGEL. Senator Feinstein, any additional comments?

Senator FEINSTEIN. None. Thank you, Mr. Chairman.

Senator HAGEL. Mr. Secretary, thank you.

If the second panel will come forward, we will get started. [Pause.]

Senator HAGEL. Mr. Valenti, we will begin with you. Welcome, again, Jack. It is nice to have you.

STATEMENT OF JACK VALENTI, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, MOTION PICTURE ASSOCIATION OF AMERICA

Mr. VALENTI. Thank you, Senator Hagel. And thank you, Senator Feinstein, for being here. I am grateful to you.

When Abraham Lincoln ran for Congress, in his first speech to his constituency he said, My politics is short and sweet, like the old woman's dance. So is my testimony. Because this is not a very complicated issue. You understand what the treaty is all about.

I consider this copyright treaty, Mr. Chairman, to be an anti-theft, anti-crime treaty, because it is going to commit all of those who sign the treaty to lift the level of their copyright protection for intellectual property, which is private property which belongs to those who finance it and create it.

There is no question that the United States is the great electee of this treaty, because as has been said, we have market supremacy in intellectual property all over the world. Now, there are those in many parts of the world though, thieves who with shameless zest steal this private property. And they do it knowing that it is

a high reward, low risk enterprise. I am hopeful that this treaty will begin to turn that felonious design on its head.

Now, the question is, why should those of us who live in this free and loving land count this treaty to be important? I think Senator Feinstein has catalogued it beautifully. Because, today, intellectual property, movies, television programs, books, music, and computer software are the largest contributors to the health of this economy. And she set forth all of the figures.

And I will not repeat them, though I would like to etch them on my forehead so that everyone who greeted me on the street would find for easy reading what this intellectual property does not just to California, though it is a great boon to that great State, but for this country as a whole.

One of the things Senator Feinstein said was that intellectual property is creating jobs at three times the national rate of this economy. And she pointed out what it means to California. But these jobs are being created all over this country. And these are not minimum wage jobs.

These are fairly—I would say substantially paying jobs. But the one fact which is the most congenial and the most cheerful fiscal fact that ought to be relevant to this committee is, to follow on with Senator Feinstein's numbers, for the first time intellectual property has now gathered in more international revenues than any single American industry in this country.

More than aircraft, more than automobiles and auto parts, and more than agriculture. I think that can be summed up by saying that intellectual property is America's grandest trade prize, a triumphant economic and creative achievement that is worthy of the support and the protection of this Congress.

Now, the American film industry is, of course, the largest in the world, singularly successful on all continents. And we confront thievery every day. Every day we have to be vigilant, because, like virtue, we are every day besieged. And this war that has been going on, it is raging. Sometimes we make some headway, sometimes we fall back. But what I am saying to you now, unless protective shields are put in place to protect intellectual piracy in the digital age, all of the grand promise for the future for this industry is put to hazard.

Emerson's doctrine says that for every loss there is a gain and for every gain there is a loss. It was never more alive than in this issue. The gain is that the magical new digital technology has unbelievable benefits for those who use it. It is a wondrous thing to behold. That is the gain.

But the loss is the dark, corrosive underside to digital technology in that it makes thievery far easier and far easier to copy. And that is why, unless we are able to find some way to balance the losses and the gains and to protect this private property, this intellectual property when it moves in the digital world, then we are in peril.

I hope that this committee and the Senate will pass this treaty quickly and feel the sure and I like to believe illuminating pride that comes to any lawmaker when you put your imprint on something which benefits so many citizens in this country.

Now, I am quite fascinated with what I am saying up here. But I think the best thing I can do is tell you this is the short and sweet testimony that I promised. Thank you.

Senator HAGEL. Mr. Valenti, thank you.

[The prepared statement of Mr. Valenti follows:]

PREPARED STATEMENT OF JACK VALENTI

On December of 1996, representatives from over 160 nations gathered in Geneva and out of the babel of so many varying opinions, they all agreed to the World Intellectual Property Organization Treaties.

One treaty dealt with phonogram performers and audio performers' rights. The other treaty lifts the level of copyright protection in every country signing the treaty. In short, it obligates signatory countries to update national copyright laws to cope with the digital environment. And more importantly, it compels them to enforce those laws by efficiently and swiftly prosecuting digital thieves who pilfer the creative works of others. Not surprisingly the largest beneficiary of this WIPO document is the United States, the most dominant force in intellectual property throughout the world.

In May of this year, the U.S. Senate passed the Digital Millennium Copyright Act, implementing the WIPO treaties by a 99 to 0 vote. On July 29, the House unanimously passed a companion measure after careful study and approval by both the Judiciary and Commerce Committees. This legislative action by both Senate and House now moves to Conference to shape the final design.

Now, the Senate Foreign Relations Committee has the responsibility to ratify the treaty, completing the journey of the WIPO treaty through the Congress of the United States, thereby offering intellectual property the full weaponry of the law to protect its voyages in cyberspace from thieves who have previously determined that stealing creative works is very rewarding and very low risk. We aim to turn that felonious design on its head.

First the numbers. The core copyright industries, and by that I mean motion pictures, television programs, home video, music, books, and computer software are immense contributors to our nation's economy.

In 1996, these industries contributed an estimated $278.4 billion to the U.S. economy, accounting for 3.65% of the Gross Domestic Product.

The real annual growth of the copyright industries has been more than double the growth rate of the economy as a whole.

From 1977 to 1996, the job growth in the copyright industries was nearly three times the employment growth for the economy as a whole.

And surely the most impressive array of fiscal arithmetic is located in this fact: This nation's copyright industries have gathered foreign sales and exports of $60.18 billion. More than agriculture. More than automobiles and auto parts. More than aircraft. It can all be summed up in one simple sentence: Intellectual property is America's grandest trade pnze. a triumphant economic and creative achievement worthy of the enduring support and protection of this nation.

Why is it necessary to act now in both the passage of implementing legislation and ratifying the treaty? Because we are grazing the outer entering edge to a new world. filled with instant information and entertainment: The exploration of the Internet and digital horizons which, at this moment, appear to be limitless.

Like Emerson's doctrine that "for every gain there is a loss and for every loss there is a gain," within the glittering potential of the Internet lies the darker forms of thieves who, armed with magical new technology, are capable of breaking-and-entering conventional barriers to steal copyrighted material borne to the Internet by just about anybody with a working computer. Without protective sinews in place, without rules of the game enforced by law, America's largest economic asset would be put to peril, blighted by new technology so beneficial, and yet so corrosive if copyright owners are unable to protect their private property. That is not an acceptable road to the future. That is the central and most commanding reason why this Committee should ratify the treaty. Updated international standards for copyright protection, as the WIPO treaties provide, are part of the solution to this problem.

While ratification requires only minimum changes to U.S. existing law, it compels nations around the world to raise their minimum standards to meet those of the United States. Stated simply, clearly, this is an anti-crime, anti-theft treaty.

We must not forget that the Geneva assembly placed a two-year deadline during which at least 30 nations must ratify the treaties. The world is watching and waiting to see what the U.S. does. If we, with so much at stake, do not move to ratify, what possible incentive do other nations have for taking similar action?

The U.S. film industry, the most successful on this planet, currently confronts ceaseless thievery around the globe. We have made great headway but the war rages on. Our successes come primarily because the pirates today must cope with formidable distribution problems. Physical copies of a film must be obtained and then smuggled across borders and parceled out to distributors before reaching the ultimate consumer.

But digital networking will make today's piracy problems seem almost saintly. A pirate master will be digitized, posted on the Web, and made available to users of the Internet all over the world. Or the master can be used to make an infinite number of pristine copies (take note: the 1,000th digital copy is as pure in quality as the first copy, which is not so in analog where copying degrades quality). A single thief in an unprotected digital environment can be a big-time, full-fledged distributor of illegal filmed product. This is not simply a question of domestic theft. Entrepreneurial criminals around the globe are shamelessly excited by the prospect of enlarging riches, ready for the next technological advance that enables easy transfer of digitized movies. Even with today's Internet, which will look positively primitive in the years to come, I have seen pirated copies of films as current as "Mulan" and Steven Spielberg's landmark epic "Saving Private Ryan," available for downloading. The transition to cyberspace ought not and must not collapse and destroy the basic American value of private property. You will be pleased to note that within the implementing legislation are special protections for libraries, schools, and other nonprofit institutions. "Fair use" remains unchanged. Legitimate devices are unaffected; the language focuses specifically on illegitimate devices aimed at circumventing technologies used to protect creative works online.

I hope that this Committee will feel the sure pride that comes to lawmakers when they put their legislative imprint on something with so much benefit to America's advance into the digital age.

Senator HAGEL. Let me reintroduce our panel as I introduce each for their statements. As you know, I introduced everyone at the beginning. But next we will hear from Mr. Neel, Roy Neel, the President and CEO of the United States Telephone Association. Mr. Neel, welcome.

STATEMENT OF ROY M. NEEL, PRESIDENT AND CHIEF EXECUTIVE OFFICER, UNITED STATES TELEPHONE ASSOCIATION

Mr. NEEL. Thank you, Mr. Chairman, Senator Feinstein.

Jack said it very well in terms of the need for this treaty internationally and protecting of U.S. Property against piracy.

I represent not only more than 1,000 local telephone companies, literally hundreds in both Nebraska and California and throughout the country, but also the ad hoc Copyright Coalition, which includes virtually the entire Internet service provider community, which includes many of our traditional competitors such as AT&T and MCI, and now America On-Line, and the Commercial Internet Exchange, which represents hundreds of very small Internet service providers.

So I am here speaking on behalf of the entire carrier community, if you will, that is building and developing the Internet.

In addition to being carriers of copyrighted property and all manner of telecommunications, almost all of our members also own substantial intellectual property, software, data bases, directories, and so on.

So we have a stake in both sides of the issue of liability as it applies to the evolution of the Internet and to the policing of the unauthorized theft of copyrighted property. We have a real stake in making sure there are anti-theft measures in place.

But we also have a real stake in making sure that carriers and providers of Internet services are not unduly exposed to third party

lawsuits simply because they move intellectual property down pikes, whether they repackage it or whatever.

This industry, and the broader service provider industry, was facing immense liability from lawsuits which would have—and I do not believe this is an idle threat—would have virtually shut down the future development of the Internet. And without going into platitudes about the Internet and the importance to the economy of this country and to democracy worldwide, I think we all understand the implication of literally bringing the investment in that new technology to a halt.

We have been arguing and fighting about these issues about liability for years now. And it was enormously satisfying to all of us that Jack and I and Hillary Rosen with the recording industry, the Internet service community, all of the major—the content community, the carrier community, the service providers were able to link arms and agree on a progressive compromise.

It is virtually historic to get ahead of a technological curve like this and avoid the kind of protracted, expensive and miserable legal battles that have faced these kinds of technologies in the past. So it is very rewarding that we have been able to do that, that we have completed that process, and virtually everyone has accepted this. The legislation passed the Senate 99–0 and the House by a voice vote. So this is really important.

This community needs protection from inappropriate liability challenges, lawsuits that, as I said, could shut down the entire evolution of the network. That, obviously, is going to benefit consumers. Not only those who use the Internet extensively right now, but everyone in the education community, everyone who is now exploiting this growing technology, this growing network.

And the fact that the content community and service providers have been able to agree on this, with the help of this committee, of the Judiciary Committee, and all of those who have been involved in this process in the House and the Senate, the administration, I think, is really a tribute to your leadership in this area.

More particularly, thank you for your opening comments that there must be linkage between the implementation legislation and this treaty. We will not get this done if it is not done this year. It is critical that this treaty be enacted.

It is critical that the implementation legislation be enacted, and that they be done together. Because the reality of this is that if the treaty moves and the implementation legislation bogs down, dies for whatever reason, narrow or broad, it could be years before we could come together on this again. And we would leave the entire U.S. Economy, the telecommunications economy, and certainly the Internet economy, in serious jeopardy.

And as I said, it is historic not only that we have been able to reach agreement on these liability questions in the U.S., but that these industries, the motion picture industry, the record industry, the software publishers, the telecommunications carriers and others are able to advance this as a worldwide model, because this technology is not a domestic medium.

In its best form we see all manner of folks bringing down dictatorships, bringing democracy into places where we have severe

problems, Burma and so on, by use of the Internet. It is an international medium not only for democracy but for commerce.

So this should be the model. The implementation legislation in the U.S. Should and can be the model throughout this world which will undoubtedly help the U.S. Content community and others developing Internet services worldwide. It is absolutely critical.

And I am very pleased that Jack and the motion picture industry, the recording industry, and the software publishers have agreed to lock arms and take this as a model worldwide.

I will stop there. You have my testimony for the record. Again, we want to thank you for holding this hearing and, in particular, thank you for emphasizing the key element of linkage between these two bills. It is absolutely critical. It is not just process, it is substance. And it is the whole future of the Internet economy. Thank you.

Senator HAGEL. Mr. Neel, thank you.

[The prepared statement of Mr. Neel follows:]

PREPARED STATEMENT OF ROY NEEL

Thank you Mr. Chairman.

My name is Roy Neel and I am here testifying on behalf of the United States Telephone Association (USTA). USTA represents over 1400 telephone companies, virtually every one of these 1400 local companies is also an Internet service provider.

I appreciate the opportunity to testify about the WIPO Treaties and the importance of providing legal certainty to the Internet service providers ("ISPs") that provide Internet access to millions of people everyday. The WIPO Treaties provide a framework to protect copyrighted works in the digital age and the implementing legislation provides complementary protection for ISPs. Telco ISPs invariably are both content owners and service providers. In virtually every case we own valuable intellectual property such as directories that are vulnerable to Internet Piracy today. At the same time, as service providers, the current law in the U.S. and many other countries subjects us to the risk of unreasonable claims of liability that could stifle this new and expanding medium. In light of this dual role, USTA members are uniquely situated to appreciate both sides of the critical copyright liability issues before Congress today.

We support ratification of the WIPO Treaties in conjunction with legislation that implements reasonable protection from excessive copyright infringement liability for ISPs. This legislation is necessary since the WIPO Treaties do not specifically address the ISP liability issue. Statements agreed to by the delegates to WIPO, however, do contemplate that ISPs should be protected from liability when they provide facilities and services that are used by others to infringe. The U.S. Congress, after much debate, is poised to pass legislation (H.R. 2281) to implement a compromise regarding ISP liability that was agreed to and is supported by the content and service provider industries.

The bill was passed by the House by a unanimous voice vote. A virtually identical bill passed the Senate 99-0. This important compromise will provide ISPs with much needed liability protection in the United States. USTA believes it is critical that this legislation be passed by Congress and signed by the President before the WIPO treaties are ratified.

However, even if the compromise legislation provides ISPs a measure of legal certainty in this country, telephone companies and ISPs still face grave uncertainty in the international legal arena. The delicate balance reached in the U.S. and embodied in the WIPO implementing legislation will be for naught if Telcos and ISPs can still be held liable overseas for copyright infringements arising from material that users send across their systems.

It is crucial that this Committee and this Congress send a very strong signal to our international partners that ISPs must be protected from such potentially stifling lawsuits. The legislation that Congress is expected to pass should serve as model legislation for other countries of the world as they ratify the WIPO Treaties. We urge the Committee to reference this model legislation as you ratify the Treaties.

Just as Jack Valenti and MPAA want to promote the export of U.S. movies, our telephone companies want to promote the export of this U.S. model legislation that ensures fair ground rules for ISPs.

Internet Promotes Free Markets

We are just beginning to appreciate the multitude of benefits provided by the Internet. Some have said that the Internet is to the 20th century what the Gutenberg press was to the 15th century: a technological breakthrough that has unleashed the power of information. The explosive growth in the Internet is dramatically reshaping economies and political institutions worldwide.

At the end of 1997, there were over 100 million Internet users around the world. According to the director of the MIT Media Lab, Nicholas Negroponte, the number of worldwide Internet users could soar to perhaps 1 billion by the end of the decade. Internet traffic will probably exceed voice telephony by the year 2000. With more than 175 countries connected to the Internet, the Internet has truly become a global system.

Companies large and small are taking advantage of affordable electronic commerce to communicate with worldwide suppliers and customers, reduce costs, conduct research, and streamline logistics. According to a report by the Commerce Department, on-line transactions between businesses have grown significantly and are expected to exceed $300 billion by the year 2002.

Today, consumers can order a wide range of goods and services through their home PC, including books, airline tickets, music, clothing, securities, and software programs. They can even buy a car without leaving their homes. The Commerce Department predicts that other services will be increasingly available through the Internet, including banking, insurance, entertainment, health care, education, and consulting.

The Internet Promotes Democracy and Ideas

The Internet is not just about the exchange of goods and services, but also ideas. Nowhere is this medium more valuable than in the struggle to promote democracies and market economies in closed societies. Ratifying the WIPO Treaties and passing the compromise legislation will help to promote these vital interests by removing impediments to the further deployment of Internet access. This new tool is being used effectively by activists around the globe to expose abuses, promote change, and build alliances. Its importance has been compared by the United States Institute of Peace to a "crowbar that pries open the very closed, highly secretive and tightly controlled nation by creating an information-rich highway to the world."

In Burma, where all forms of media are controlled by the military, the opposition has effectively used the Internet to distribute information inside and outside the country about the abuses of the military government. Democracy and human rights activists have kept the world informed of developments in Burma by posting up-to-the-minute reports in English on the Internet or through e-mail.

Chinese activists also are tapping into the power of the Internet to reduce the dependency on government information and to build bridges to the outside world. Since 1997, an underground group has secretly published on the Internet a Chinese-language journal called the "Tunnel" with the declared intention to "break through the present lock on information and controls of expression." The democracy journal is filled with stories about sensitive subjects such as Tiananmen Square and the collapse of communism in Eastern Europe.

There are also numerous examples of how the Internet can be used to promote market-based values in China, the former Soviet Republics, and many developing countries in the Middle East, and Latin America. The U.S. Chamber of Commerce's Center for International Private Enterprise, for instance, is disseminating public information through the Internet about private property, free trade, and other market-based concepts.

In light of its numerous advantages, it's not surprising that the Internet is rapidly becoming the medium of choice for promoting democracy and market economies around the world. If fax machines and information can contribute to the collapse of the Iron Curtain and the Berlin Wall, imagine what the Internet can do.

Summary of the WIPO Treaties

From December 2–20, 1996, the World Intellectual Property Organization convened the first Diplomatic Conference in 25 years to consider several treaties to update copyright laws for the digital age. Delegates from more than 125 countries attended, as did representatives from some 90 nongovernmental organizations, including USTA. The Diplomatic Conference debated and subsequently adopted two treaties (1) the WIPO Copyright Treaty, which addressed certain copyright issues pertaining to computer programs, databases and digital environment, and (2) the

"WIPO Performances and Phonograms Treaty," which addresses certain rights for the performers and producers of sound recordings. The treaties create significant rights for copyright owners, performers and record companies.

The issue of ISP liability was the subject of much debate at the Diplomatic Conference that adopted the two treaties. It is important to note that the Conference did adopt language in an "agreed statement" indicating its support for the proposition that an ISP that merely provides facilities for communications should not be deemed thereby to be an infringer. The Conference decided that the specifics regarding legal parameters for ISP liability was properly left for national laws, rather than to the treaties.

Just as it is important for copyright owners that their rights be harmonized throughout the world, it is critical to Internet service providers that the rules governing liability be consistent throughout the world. The compromise reached by the interested parties in H.R. 2281 should serve as a model for these rules.

Threat of Lawsuits and The Need for Congressional Action

A consensus has developed in the industry and the Congress that the issue of ISP liability for copyright liability must be addressed. The almost unanimous votes in both Houses of Congress are a clear indication of this overwhelming consensus. This consensus results from the potentially devastating liability that can be imposed under copyright law. Liability for direct infringement has been interpreted to be a strict liability doctrine that will attach to anyone who copies, distributes or performs a copyrighted work, without regard to their knowledge or intent. At least one court held a bulletin board operator strictly liable simply on the basis of the actions of his bulletin board system, which responded to commands from users.

In addition, copyright law includes doctrines of contributory and vicarious liability that have been construed by some courts to be very broad. Clear limitations need to be placed on these doctrines in the digital online environment when systems are used by third-party users.

USTA supports taking action against the *actual* infringes through the courts. But the suits that been filed and threatened by others could create a *chilling effect* on the provision of Internet service unless promptly addressed by Congress.

Furthermore, before the parties worked out the proposed compromise, copyright owners had at times threatened to make ISPs the Internet copyright police. For example, in 1995, the Church of Scientology filed two lawsuits against small to mid-sized ISPs because third-party infringers had used their Internet access services and posted material that allegedly violated a copyright.

In 1996 the Software Publishers' Association (SPA) independently filed a series of at least five lawsuits against ISPs regardless of whether they had any knowledge of or control over an infringement. SPA claimed that ISPs are liable as infringers of copyrighted works simply by virtue of the fact that subscribers lease server space and Internet services from an ISP, or provide a mere hyperlink to infringing materials that exist at another location.

The 1997 SPA Report on Global Piracy warns "This case serves as a warning to Internet users . . . and to the ISP condoning the illegal activity." The June 10, 1997 edition of *Variety* reports on a series of lawsuits filed by the Recording Industry Association of America. Although the specific suits filed by RIAA do not name ISPs, RIAA Vice President Frank Creighton left no doubt that suits against ISPs were coming. "The fight about third party liability will be resolved in future litigation," he told *Variety*. Fortunately, with the passage of H.R. 2281, we are hopeful that the days of *litigation* are over and the days of *cooperation* are near.

International Examples

There is still a concern with the legal uncertainty that we face in many countries. Under current copyright law in many countries, ISPs risk being held liable for damages for copyright infringement perpetrated by individuals without the knowledge of the ISP. There have been cases in several countries were ISPs have been sued for merely providing access to a site that contains infringing material.

Furthermore, this issue is being debated in various parts of the world: the European Commission (EC) is in the process of preparing a proposal to clarify various legal concepts in cyberspace, including the liability issue. The ISP liability issue is under consideration in many parliaments and legislatures around the world. Countries are looking to this Congress for leadership.

USTA members are committed to the Internet, but the threat of copyright lawsuits is becoming an increasingly salient consideration in offering Internet service whether in rural markets or *international* markets.

The Blueprint for a Model Legal Structure

Before discussing the specifics of the compromise legislation, I would like to tell you why we believe Congress should pass legislation regarding ISP liability. First, information travels through the local exchange backbone and trunk lines as well as network components such as routers, connectors and servers in digital packets of ones and zeros. Hence, monitoring by the service provider will ultimately fail to protect intellectual property. While this content is moving through the network in computer code, there should be no liability.

Furthermore, even if monitoring were feasible, an ISP has no way of ascertaining whether a particular song or article or computer program is an authorized version or a pirated, illegal version. The copyrighted material could be a licensed use that resulted from a vast chain of contracts that only months of research could uncover. For example, the famous Beatles' song, "Yellow Submarine" provides a good example: Paul McCartney, one would assume, owns the rights to this Beatles' song, but he does not—Michael Jackson does.

Second, when information becomes available to the human eye, such as when it resides on a web site, a cooperative system of "notice and take down" should be established. Under a cooperative system, the content owner has the responsibility to identify infringements and the service provider must act responsibly to act on that notification.

It is critical to understand that only Congress can enact this sort of solution. It is unrealistic to expect that the courts, acting on a piecemeal case by case basis, could develop the ultimate solution. Likewise, in other countries, the legislatures or parliaments should address this issue of copyright liability for ISPs.

A Model Approach: The Pending ISP Legislation

First, we congratulate and commend members of the Senate and House for passing legislation to clarify the confusion created by the inconsistent case law on service provider liability. We are very appreciative of the efforts of Senators Hatch, Leahy and Kohl as well as Congressmen Coble, Goodlatte, Hyde and Bliley. We are especially grateful to Senator Ashcroft who introduced one of the early bills on ISP liability protection. We need a legislative solution to this problem and we need it in the Congress.

After weeks of negotiations, the various stakeholders were able to reach a compromise on legislation to address our concerns regarding ISP liability. The agreement provides that copyright owners and ISPs should share responsibility for protecting intellectual property on the Internet. When copyright owners discover infringement on-line, they should notify the ISP whose servers access the infringing material. When ISP's acquire actual knowledge or detect a red flag that their services are being misused for infringing purposes, they would be obligated to take reasonable steps to halt further abuse.

The U.S. compromise can be distilled to three key elements. It provides:

1. Clear, unconditional protection for conduit (carriage) activities.
2. Protection from liability for caching, which is essential to the efficient functioning of the Internet.
3. A "notice and take down" regime for material residing on the provider's system, coupled with a new, carefully negotiated actual knowledge and "red-flag" standard in the absence of notice.

The legislation provides that in response to appropriate notice from the copyright owner, ISPs would be obligated to prevent their services from being used to access infringing material. If, however, an ISP has neither received notice of infringement nor otherwise has actual or "red flag" knowledge that it is occurring, then it would not be held responsible for the acts of third parties. We believe this proposal allocates responsibility for protecting intellectual property fairly and efficiently.

Rational for this Model Legislation

There are several fundamental reasons why a "notice and take-down" structure is an appropriate legislative model to solve this complex matter. First, the concept of holding ISPs liable for copyright infringement when the ISP does not have actual knowledge would raise grave privacy concerns. It is impossible for ISPs to monitor every customer's transfer of electronic data. We, as a society, do not want ISPs to initiate such a massive invasion of privacy.

Second, if ISPs were required to employ an army of snoops to pick through every user's e-mail and Usenet postings, the *enormous cost* ultimately would be passed on to customers. The consequence would be to convert a convenient and democratic medium into an expensive and elite one.

Finally and more importantly, even if ISPs could investigate every corner of the expanding online universe, ISPs would have no way of knowing whether the material they encounter is authorized by the current copyright owner or not.

We believe that the task of ferreting out copyright infringement on the Internet should fall to the copyright owner. Today, copyright owners have access to a large array of Internet search engines and "spiders" to sniff out material they know belongs to them. Once copyright owners discover infringement, they can bring it to the attention of the ISPs. It is at this point that the ISPs can act and would be *required* to act by the compromise legislation.

The "notice and take-down" regime that is proposed is one of joint responsibility between copyright owners and ISPs. USTA strongly supports the implementing legislation that spells out the obligations of the ISPs and copyright owners.

Conclusion

USTA strongly supports protection for copyright and other legal interests on the Internet. USTA member telephone companies provide Internet access services, but they are also owners of vast holdings of intellectual property. Our members have powerful incentives to preserve the value of their copyright portfolios through the protection of our nation's intellectual property laws.

The "notice and take-down" concept set forth in the compromise legislation implements a commonsense approach. Content owners identify the infringements and then contact the ISP that can assist them in fighting piracy by taking the offending material down: This legislation should serve as a model for countries around the world that must resolve the complex issues surrounding the Internet and ISP liability. In order to protect the valuable resource of the Internet, it is important to secure similar legislative protection in other countries. Those who are building the Net itself need fair and predictable ground rules. I urge this Committee to use this opportunity to promote this common-sense solution to our international partners.

As the Supreme Court wrote recently, "The Internet is a unique and wholly new medium of worldwide human communication." *Reno, et al.* v. *ACLU,* 117 5. Ct. 2329 (1997). The Internet has no owner. It knows no national boundaries.

We look forward to working with the Committee as you consider the WIPO Treaties.

Senator HAGEL. Let me reintroduce Professor Jaszi, who is an Associate Professor of Law at the Washington School of Law, American University. Is that correct?

Mr. JASZI. A full professor, actually.

Senator HAGEL. All right. Fire away. It is nice to have you.

STATEMENT OF PETER JASZI, PROFESSOR OF LAW, WASHINGTON COLLEGE OF LAW, THE AMERICAN UNIVERSITY, ON BEHALF OF THE DIGITAL FUTURE COALITION

Mr. JASZI. As a professor of domestic and international copyright law, Mr. Chairman, Senator Feinstein, Senator Sarbanes, I am honored to appear before you today on behalf of the Digital Future Coalition, which includes 43 national organizations representing millions of educators, librarians, high tech innovators, creators, and electronic information consumers.

Our members own and use copyrighted works, and they depend on a legal regime which assures both strong proprietary rights and reasonable opportunities for public access. We welcome this chance to make three principal points about ratification and implementation of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

First, as we have emphasized throughout the 105th Congress, the DFC strongly supports ratification of the WIPO treaties in connection with the enactment of balanced implementing legislation of appropriate scope. Our members would welcome the additional protection abroad which the treaties could bring. But foreign protection should be secured at the expense of the American public.

Second, neither S–2037, the Senate-passed implementing bill, or HR–2281 adopted in the House yet strikes the necessary balance in domestic law. The Senate bill does not do enough to preserve fair use, while the House bill includes a host of controversial and extraneous provisions which would overturn the effect of three recent Supreme Court decisions.

Third, and finally, we therefore urge the committee to put its own stamp on the implementation process by delaying action on a resolution of ratification until Congress has passed legislation which maintains copyrights historic balance between owners' rights and users' privileges.

Here, I would note two important statements by the delegates to the 1997 WIPO Diplomatic Conference. In a gesture without precedent in international law, the preambles to the new treaties specifically acknowledge the need to maintain a balance between the rights of authors, performers, and producers and the larger public interest, particularly education, research, and access to information.

Moreover, at the urging of the United States delegation, the texts of both treaties are qualified by an agreed statement making it clear that nations may carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws.

These statements mean, for example, that the United States may carry forward the centuries-old fair use doctrine, which we take for granted in the analog world. Because of it you may photocopy a newspaper article, quote from a book, or make limited use of another's work without advanced permission.

All Americans would benefit if implementing legislation assured the continued vitality of fair use and of the other limitations and exceptions that have helped to make our national copyright system the most successful in the world.

Unfortunately, S–2037 would effectively gut fair use by giving copyright owners broad new authority to block what are now lawful acts. Under Section 1201(a)(1) of that bill it would be a criminal offense for a student to circumvent a technological protection measure to include a map in a multimedia school report.

It could become illegal to use the next generation of VCRs to record an over-the-air broadcast program, a privilege specifically recognized by the Supreme Court in its Beta Max decision. It would even be unlawful for your staff to destroy a copy protected computer virus that had infected your office information system.

In addition, S–2037 would stifle the development of new technology by potentially banning a host of useful consumer products under the guise of regulating so-called black boxes. Like everyone on the panel, our members are quite prepared to outlaw black boxes. But we want to be certain that in doing so Congress does not enact legislation that would outlaw perfectly legitimate devices with substantial non-infringing uses.

HR–2281 does the bare minimum necessary to maintain some semblance of balance. It includes a no mandate provision making it clear that makers of consumer electronics, telecommunications, and computing products are not required to design their devices to respond to any particular technological protection measure.

Moreover, the House bill permits encryption research and provides strong protections for the privacy of information consumers. And it establishes a procedure to ensure public access to categories of copyrighted works if certain findings are made by the Secretary of Commerce.

In our view, still more should be done to achieve balance. As demonstrated in an analysis which is attached to my written statement, the Senate could preserve a strong fair use doctrine and still meet our WIPO treaty obligations by dropping Section 1201(a)(1) entirely.

If Section 1201(a)(1) remains, the exceptions to its prohibitions on circumvention conduct must be broadened. Discussions are underway, for example, to ensure that legitimate companies continue to engage in security systems testing.

Although it moves toward balance in some respects, the House bill unfortunately includes many controversial provisions substantially unrelated to the treaties. Perhaps most troubling, the bill would provide an extraordinary new form of protection for collections of information, hampering the development of electronic commerce and imposing new costs on libraries, universities, and individual consumers. Its effect could be to award some data base proprietors a perpetual exclusive right in simple facts, subject to few if any meaningful exceptions.

No hearings have been held on this radical proposal in the Senate, and yet the House apparently expects the Senate to exceed to this extraordinary power grab benefiting a few wealthy information owners.

Attached to my written testimony is a copy of a memo from the Office of Legal Counsel of the Department of Justice strongly questioning the constitutionality of such data base legislation. And with your permission, Mr. Chairman, I would also like to include in the record a letter signed by 38 national organizations spelling out their concerns. And I would emphasize that data base legislation is not called for by the WIPO treaties.

In fact, the 1996 Diplomatic Conference specifically declined to act on proposals to create new international norms for data protection.

Your committee can play an important role by making clear that implementing legislation should be limited to just that, implementing the treaties, while leaving for another day a resolution of controversial extraneous matters added by the House without debate. In short, Mr. Chairman, while we support ratification of the treaties, the DFC continues to have serious reservations about the scope and balance of implementing legislation.

Thank you.

Senator HAGEL. Professor Jaszi, thank you.

[The prepared statement of Mr. Jaszi follows:]

PREPARED STATEMENT OF PETER JASZI

Mr. Chairman, I want to thank you and the members of the Committee for the opportunity to testify on behalf of the Digital Future Coalition, which includes 43 national organizations collectively committed to the appropriate application of intellectual property laws in the emerging networked digital information environment. Organized in October 1995, the DFC includes members representing millions of educators, librarians, high-technology innovators, creators, and electronic information

consumers. Significantly, DFC represents many individuals and entities which both own and use copyrighted works, and thus depend in their daily activities on the existence of a legal regime which assures both strong proprietary rights for protected works and reasonable opportunities for public access to those works. Over the past three years, we have been involved at every stage of the so-called "digital copyright" debate, and today we welcome this chance to present our views on the ratification of the two treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty—which were concluded at the December 1996 Diplomatic Conference of the World Intellectual Property Organization. As we repeatedly have stated, the DFC strongly supports ratification of the WIPO treaties in connection with the enactment of balanced domestic law provisions to implement these new international norms.

Background to the WIPO Treaties

In the Fall 1996, the DFC concluded that the draft treaties, (or "Basic Proposals") submitted by the Chairman of the WIPO Committee of Experts, as a blueprint for the work of the Diplomatic Conference represented a less-than-balanced approach to harmonizing owners' and users' interests in the digital environment. In the months leading up to the Diplomatic Conference, the DFC was active in advocating the inclusion of provisions in the final treaties which would adequately recognize the stakes of information consumers in the development of new digital intellectual property norms, and would allow countries adhering to the final treaties sufficient flexibility to implement those new norms in ways consistent with their traditional domestic copyright systems.

Going into the final phase of the WIPO treaty process, it was our belief that these objectives were of particular importance in safeguarding the national interests of the United States. Most countries of the world do not recognize limitations and exceptions to copyright protection which even approximate in breadth those codified in the Sec. 107 "fair use" provision of the 1976 Copyright Act, or in various other sections of that act (including Secs. 110 and 117) which provide for specific exemptions from liability. The United States is not a leader in international information commerce despite the balanced character of our traditional copyright law, but because of it. Indeed, it is the compromise of interests struck in U.S. law, by means of the cited provisions and others, that has enabled our country's artistic, scientific, and educational achievements, and provided the basis for the emergence of our internationally dominant copyright and high technology industries. To maintain the United States' leadership position in the global information economy, we must protect and preserve the unique and valuable features of our highly successful domestic copyright system, even as we adapt it to the challenges of new technology.

With this in mind, the DFC and its member organizations took an active part in the final preparations for the Geneva Diplomatic Conference. Individuals associated with the DFC participated in the United States delegation to the Conference, and others were present in Geneva as observers. Here at home, the DFC continued to make its views about the issues at stake in the Conference known to the Administration.

The WIPO Treaties

The final product of the Diplomatic Conference held in December 1996 represented substantial improvements over the original drafts in several respects. In a gesture without precedent in the history of international intellectual property treaties, their preambles specifically acknowledge "the need to maintain a balance between the rights of [authors, performers, and producers] and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention."

Moreover, at the specific urging of the U.S. delegation to the Conference, the texts of both treaties are qualified by a so-called "Agreed Statement" (with special weight as an aid to interpretation under the terms of the Vienna Convention on the Law of Treaties), to the effect that:

> [C]ontracting Parties [may] carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

In contrast to the more limiting formulation of the proposed draft treaties, the final provisions concerning "Obligations Concerning Technological Measures" guarantee parties flexibility with respect to the implementation of new "anticircumvention" rules, stating that:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by [authors, producers or performers of phonograms] in connection with the exercise of their rights under [these Treaties or the Berne Convention] and that restrict acts, in respect of their works, which are not authorized by the [authors, producers or performers of phonograms] concerned or permitted by law.

On the highly controversial issue of database protection, which had been the subject of a third draft treaty proposed by the Chairman of the WIPO Committees of Experts, the Diplomatic Conference concluded that significant work remained to be done before this subject could be considered ripe for any consideration within the WIPO framework.

As already noted, as a matter of general principle the DFC strongly supports ratification of the new WIPO treaties in their present form. The many groups of copyright owners represented within the DFC would welcome the additional protection abroad which the coming into force of the treaties would afford to their valuable creative assets. At the same time, however, all the members of the DFC are united in their conviction that the benefits of such foreign protection for U.S. copyright owners should not be secured at the cost of domestic U.S. information consumers, as would be the case were the treaties to be implemented through less-than-balanced legislation here at home. Thus, we would respectfully urge the Committee to follow the practice of reserving any final recommendation on the issue of ratification until such time as implementing legislation is in place which adequately addresses to concerns of all affected domestic groups, and which maintains the historic balance between owners' rights and users' privileges represented by U.S. copyright law.

Outstanding issues relating to implementation of the WIPO Treaties

In a letter dated August 24, 1998, a copy of which is attached to this testimony, the DFC informed the members of the Senate of the full range of its current concerns with Senate and House bills (S. 2037 and H.R. 2281, respectively) designed to implement the WIPO treaties. Rather than reviewing those concerns exhaustively in this testimony, I will highlight here some of the most urgent and important, putting particular emphasis on the ways in which outstanding proposals for implementation do (or do not) relate to the mandates of the treaties themselves.

Provisions relating to "black boxes"

From its inception, the Digital Future Coalition has maintained that new legislation designed to combat "piracy" in the digital network environment must be crafted to give continuing effect to the landmark Supreme Court decision in *Universal* v. *Sony,* 454 U.S. 417 (1981), which ruled that because consumer use of home video recording equipment for "time-shifting" constituted a "fair use," copyright law could not be employed to restrict the manufacture, sale or importation of consumer electronic devices which had this "substantial noninfringing use." Specifically, we have argued that to preserve the availability of multi-purpose consumer electronic devices (such as VCR's and PC's) it is essential that prohibitions on technology contained in any new digital intellectual property legislation should be limited to those devices which are specifically designed or marketed to defeat owners' efforts at technology self-help. The overbreadth of the technology regulations contained in "digital copyright" bills introduced in the 104th Congress, prior to the conclusion WIPO treaties, was a principle basis of DFC's opposition to those proposals.

It is generally acknowledged that the WIPO Treaties' provisions on "Obligations Concerning Technological Measures" make it necessary for contracting states to take steps under national law to discourage and penalize trafficking in devices which are intended specifically to avoid or override technological protection measures (such as encryption and secure passwords) applied by owners of intellectual property to safeguard material in digital form against unauthorized duplication and distribution. It is also the opinion of many experts that enactment of adequate and effective measures against special-purpose "black boxes" would, in itself, be sufficient to satisfy a contracting nation's obligations in this regard. This position is set out more fully in a recent letter from 19 law teachers to the Senate Judiciary Committee, dated September 2, a copy of which is attached to this testimony.

Although ground for controversy remains as to whether any new legislation is required to bring United States law into compliance with the mandates of the treaties in this respect, the DFC does not oppose additional legislation tailored to deal with the problem of "black box" technology (and equivalent services). We continue to be concerned, however, that in the name of regulating "black boxes," legislation may be enacted which limits the availability of useful multi-purpose consumer electronic devices. In this regard, neither the House nor the Senate version of the Digital Mil-

lennium Copyright Act, as the bills to implement the WIPO treaties are known, is ideal. Neither, for example, contains a clear definition of what constitutes a qualifying "technological protection measure," and neither deals adequately with the authority or manufactures, retailers, and ordinary consumers to make product adjustments to address "playability" problems. Having said that, we were heartened that the Senate included in its bill a "no mandate" provision (however circular in its drafting) that seemed to confirm that nothing in S. 2037 could be interpreted as a mandate on product manufacturers to design telecommunications, consumer electronics, and computing products so as to affirmatively respond to or accommodate technological protection measures that copyright owners might use to deny access to or the copying of their works. The House Commerce Committee made an important contribution by eliminating the potential for misinterpretation of the "no mandate" provision of the final House bill, H.R. 2281. This provision, which we believe should be preserved in any final implementing legislation, has the effect of assuring that, in practice, the emphasis in the enforcement of the device-oriented anti-circumvention provisions will be on true "black boxes"—just as the WIPO treaties require.

Provisions relating to "fair use" and other consumer use privileges

Both the Senate and House bills contain provisions which would impose civil and criminal liability on individual information consumers who engage in unauthorized "circumvention" of technological protection measures applied by proprietors to protected material in digital formats. As the September 2 law professors' letter demonstrates at length, such provisions are not required to implement the WIPO treaties, and the DFC believes that, as a matter of information policy, the inclusion of such provisions in any legislation at this time would be unwise.

The reasoning behind this conclusion is simple: Because prohibitions against "circumvention" (although codified in Title 17 of the U.S. Code) would not be part of the Copyright Act, they would not be subject to the various limitations and exceptions to copyright which the Act incorporates. Thus, for example, a software vendor could use technological protection measures to prevent purchasers from making "backup copies" of its products, and any consumer who nonetheless did so could be successfully sued or prosecuted—even though 17 U.S.C. Sec. 117 specifically authorizes the making of such archival copies as a matter of copyright law itself. In the same vein, an electronic information vendor who wished to restrict the ability of readers, viewers and listeners to comment negatively on its products could use technological protection measures backed up with the threat of legal sanctions against circumvention to frustrate such criticism, even though the copyright doctrine of "fair use" authorizes the use of quotations from protected works for this purpose. Likewise, providers could use technological safeguards to compel consumers—whether home users of the Internet or library patrons—to pay again and again in order to receive electronic access to the same items of electronic information.

The House and Senate bills incorporate some potentially significant, although narrowly drawn, exceptions to their broadly worded prohibitions against consumer circumvention. The Senate bill permits circumvention for law enforcement uses and certain forms of reverse engineering. The House bill also permits circumvention for encryption research and for the protection of personal privacy. Crucially, however, neither bill includes any provisions that would explicitly reach any of the potential abuses cited in the previous paragraph, or (to cite another example) that would clearly exempt from liability the activities of firms and individuals engaged in crucial and otherwise lawful computer security testing.

In one respect, however, the two bills differ markedly. While the "anticircumvention" provisions of S. 2037 are qualified only by a handful of specific exemptions, H.R. 2281 adopts an alternative to the Senate version of this so called Sec. 1201 (a)(1) that would authorize the Secretary of Commerce to selectively waive the prohibition against the act of circumvention to prevent a diminution in the availability to individual users of a particular category of copyrighted materials. Under the compromise embodied in the House 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.

The DFC cannot support WIPO implementing legislation that does not contain at least this level of protection for the public interest in access to protected materials. Nor can we support treaty ratification unless implementing legislation incorporates at least these minimum safeguards against the establishment a ubiquitous "pay per use" information regime in the digital environment.

Extraneous provisions in proposed implementing legislation

To summarize the foregoing, the DFC believes that H.R. 2281, incorporating as it does the results of further efforts to harmonize conflicting interests which were undertaken after the passage of S. 2037 in May, offers a preferable blueprint for legislation to fulfill the commitments which the United States would undertake upon ratification of the new WIPO treaties. As our letter of August 24 details, however, we have profound concerns about other provisions of H.R. 2281, many of them inserted at literally the last minute. None of these provisions has been the subject of hearings in the Senate, and many were never debated or discussed in the House itself. Moreover, some of these provisions are extremely far-reaching; among other things, they would effectively overturn three recent opinions of the United States Supreme Court: *Feist Publications. Inc.* v. *Rural Telephone Service Corp.*, 499 U.S. 340 (1991); *Bonito Boats* v. *Thunder Craft Boats. Inc.*, 489 U.S. 141 (1989); and *Quality King Distributors. Inc.* v. *L'anza Research International, Inc.*, 118 S.Ct. 1125 (1998). Most crucially, all of them are wholly unrelated to the mandates of the new WIPO treaties. Instead, they represent an effort to capture the WIPO implementation process for the advancement of various specialized private agendas in the field of intellectual property law. In the interests of space, I will focus here on just two of these sets of provisions—Sec. 414 and Title V of H.R. 2281.

Section 414: A mischievous revision of the "fair use" provision

Sec. 414 would strip the language referring to use "by reproduction in copies or phonorecords or by another other means" out of Sec. 107 of the Copyright Act of 1976. But the effect of this ostensibly clarifying change could be to gut the protections for educators and consumers that were built into the statutory formulation of the "fair use" doctrine back in 1976, following years of deliberation and hard bargaining among the affected parties. The House Report (No. 94–1465) accompanying the 1976 Copyright Act states that this reference "is mainly intended to make clear that the doctrine has as much application to photocopying or taping as to older forms of use. . . . In deleting the referenced phrase, H.R. 2281 would confuse rather than clarify the law relating to the scope of this important doctrine. As a result, copyright owners would be given new legal tools to use against schools engaging in educational photocopying and against both individuals who tape broadcast programs for personal use and companies which supply hardware for non-commercial home taping.

This potentially drastic revision to the "fair use" doctrine has not previously been considered by the Senate. Nor, to our knowledge, has it been the subject of any hearings in the House of Representatives. It appeared for the first time as part of the final version of H.R. 2281 submitted to the House for action on the suspension calendar, and even on that occasion no reference was made to it in any of the floor statements of the legislation's sponsors.

Title V: Database protection

As already noted, the December 1996 WIPO Diplomatic Conference pointedly declined to act on a third proposed international agreement, concerning protection for databases and other compilations of information. Thus, I would emphasize again, implementation of the new WIPO treaties does not require any action on this difficult issue.

In this country, proposals for database protection have proved highly controversial over the past two years, in part because enacting such legislation would ignore the wisdom of the Supreme Court's 1991 Feist decision, which unanimously concluded that there were compelling constitutional and policy reasons not to extend copyright protection to facts as such. Some large international database conglomerates, such as Canadian-based Thompson Corp. and the Anglo Dutch Reed-Elsivier, Inc., favor strong database protection, as do certain smaller firms based in the United States. The U.S. science, research, library and educational communities are united in opposition to legislation which would create a "quasi-property" right in compiled information, and they are joined by many domestic firms which produce "value-added" data products for the national and international markets, such as Dun & Bradstreet, Bloomberg, and Charles Schwab & Co.

The DFC does not categorically oppose database protection. Its members recognize that predatory commercial competition among database proprietors may in fact be a problem of some significance. In that case, however, a true federal misappropriation legislation of limited scope would presumably be a sufficient cure. However, Title V of H.R. 2281, which apparently sets forth the views of the House Judiciary Committee on how best to provide legal protection against misappropriation of collections of information such as databases, is too much, too soon. In the misleading guise of a "misappropriation" provision, Title V would amount, in practice, to a new

form of intellectual property protection applicable to the previously unprotected items of information which make up the contents of the "collections of information" to which it would apply. Though nominally limited to 15 years in duration, the new rights which Title V would create could be effectively perpetual. Moreover, as drafted, Title V includes no effective exceptions for teaching, research or study uses, nor does it recognize the public interest in reasonable access to sole source databases or private databases compiled using government information.

We note that, to date, the Senate has neither debated nor held hearings on the necessity and proper scope of database protection. Under the circumstances, we believe that the premature enactment of Title V of H.R. 2281 as part of any final WIPO treaty implementation legislation would represent a miscarriage of the legislative process. Nor is there any clear urgent reason to act now in this difficult and conflicted area. Although proponents of database protection cite the need to harmonize U.S. law with new European legislation on the subject, in order to obtain reciprocal protection for U.S. data products in countries of the European Community, this argument ignores at least three important factors: First, that the process of implementing the 1996 EC Directive on Databases is still incomplete in Europe; second, that there is no guarantee that enactment of the Title V provisions by the United States would be sufficient to persuade European authorities; and third, that their current refusal to protect U.S. data products on the basis of "national treatment" may well constitute a violation of international law. U.S.-European relations with regard to databases present an international political issue, rather than a legal one. That issue is likely to be resolved only by high-level political negotiations, and it should not be the occasion for the premature enactment of domestic legislation which may severely disadvantage many domestic information consumers and producers.

The DFC and other critics of H.R. 2652, the House bill on which Title V is based, have expressed strong reservations about the measure's overbreadth and its potential deleterious effects on science, education, and information commerce. The Administration also has expressed serious concerns about the breadth and potential impact of the bill. In a recent letter, the General Counsel of the Department of Commerce said in part:

> Any database misappropriation regime should provide exceptions analogous to "fair use" principles of copyright law; in particular, any effects on noncommercial research should be *de minimis.*
>
> ***
>
> The Department of Justice has serious constitutional concerns that the First Amendment restricts Congress's ability to enact legislation such as H.R. 2652, and that the Intellectual Property Clause also may impose some constraints on legislation of this sort. We note that those constitutional concerns are closely related, in many instances, to some of the points described above, particularly fair use, the effects on potential markets and transformative uses of data.

These concerns are reflected in a July 28, 1998, memorandum prepared by the Department of Justice's Office of Legal Counsel, a copy of that memorandum is attached to this testimony, follows other critics of H.R. 2652 in questioning whether the bill may not create a prohibited new form of intellectual property protection. The Congress should proceed with special caution in an area so fraught with constitutional perils.

Conclusion

In conclusion, I would urge the members of the Committee to assure that the new WIPO treaties are implemented in a manner which accurately and completely reflects the new international obligations which the United States would undertake upon their ratification. In particular, I would urge you to reject the extraneous provisions of H.R. 2281, while embracing its approach to core treaty implementation issues. The great accomplishment of the 1996 WIPO Diplomatic Conference, attributable in no small part to the work of the United States delegation, was the articulation of a balanced framework for the introduction of greater intellectual property discipline in the networked digital environment worldwide. In our efforts at implementation, we should act in a manner true to the spirit of those treaties. This is so not as a matter of principle, but because the collective interests of all the participants in our prodigiously successful national information economy individual creators, technology innovators, teachers, students, and consumers, as well as companies with investments in information production and distribution will be best served thereby.

Thank you for your attention.

Senator HAGEL. Mr. Byrne, welcome. Mr. Christopher Byrne, Director of Intellectual Property at Silicon Graphics. Please proceed.

STATEMENT OF CHRISTOPHER BYRNE, DIRECTOR OF INTELLECTUAL PROPERTY, SILICON GRAPHICS, INC. ON BEHALF OF THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

Mr. BYRNE. Thank you. Good morning. It is a privilege to be here today.

I am Christopher Byrne, Director of Intellectual Property for Silicon Graphics. As a lawyer, an electrical engineer, and a registered patent attorney, it is my job to make sure that Silicon Graphic's intellectual property is properly protected. I also serve as Chair of the Intellectual Property Committee for the Information Technology Industry Council.

And I am here today on behalf of ITI, which includes the nation's leading information technology industry companies, everybody from Apple to Xerox and all of the letters in between. In the most recent fiscal years the revenues of our member companies totaled practically $500 billion. We employ over 1 million United States employees in the highest paying jobs. And we devote a substantial portion of our revenues to R&D.

I want to emphasize two points today. First of all is ITI's belief in the importance of the WIPO treaty, but also the importance of a balanced implementation in the United States based on wide-angle view of intellectual property.

The importance of the WIPO treaty is that it is a global acknowledgment of the value of intellectual property, and in particular that copyright law should apply in the networked digital regime. The United States should truly lead the world in this effort. However, our leadership should be through a balanced wide-angle understanding of the nature and the value of innovation and creativity in our economy.

In the past, our economy was grounded in the value of physical assets: land, natural resources, manufacturing plant and equipment.

Today, and even more so tomorrow, the assets of highest economic value are those human and intellectual assets: ideas, knowledge, information, creativity, and the ability to innovate. In a phrase, intellectual capital. Hence, the ability to exercise creativity and to innovate is critical. Innovation is how ITI member companies breathe. It is essential to our health and growth, and ultimately to the health and growth of our economy.

And ITI members are indeed innovative. Our innovations have included the solid state transistor, the integrated circuit, the microprocessor, the personal computer, the engineering workstation, the super computer and digital animation, wired and wireless telecommunications technology, consumer electronics, and all of the software necessary to run and network these devices. Our commitment to innovation is measured by our yearly private R&D investments, which average, again, approximately 10 percent of our revenues, or nearly $50 billion a year.

Finally, the benefits to our economy of our R&D investments are multiplicative, because these innovations result in products and

technologies which improve the efficiency and the productivity of working Americans.

Indeed, our economy is in large measure driven by ITI member companies' ability to continue to innovate and deliver higher performance technological goods and services at lower prices. But today the price and the pace of R&D and innovation has never been higher.

For this reason, we are ever mindful of obstacles to our ability to innovate. Our need to innovate motivated the modifications which we advocated in the implementation of the WIPO treaty bills.

At this point we believe the approach is balanced such that it will protect intellectual property, thwart digital piracy, and preserve and promote our ability to innovate. But we really want to emphasize some critical points. First of all, we must at all costs maintain the so-called no mandate provision.

It must be clear that developers and manufacturers of legitimate technology should not be bound by law to respond to each and every specific technological protection measure which may be created to protect copyrighted material. We urge adoption of the House version of the no mandate provision.

Second, we very much urge a clearer definition of an effective technological protection measure. If certain devices are to be outlawed because of their ability to circumvent an effective technological protection measure, then we need clear, workable definitions of such measures. Legal analysis and statutory construction should not have to be a research and development skill. Clearer definition here is a must. Hence, we encourage inclusion of language defining an effective technological protection measure and drawing distinctions between active and passive measures.

Finally, we urge you to remember that the interests of all of the players in this debate are synergistic and symbiotic, and ultimately a balanced approach is most sound.

From our perspective it is historically compelling that the birthplace of Silicon Valley, a true center of technological innovation, is the garage in Palo Alto, California where Dave Packard and Bill Hewlett build their very first product, an audio-oscillator which they sold to Walt Disney for the making of the movie Fantasia.

Our interests were symbiotic and synergistic then, and they are even more so today. We urge you to strike the balance which will preserve and promote this synergy.

Thank you.

Senator HAGEL. Mr. Byrne, thank you.

[The prepared statement of Mr. Byrne follows:]

PREPARED STATEMENT OF CHRIS BYRNE

I. Introduction

My name is Chris Byrne. I am appearing today on behalf of the Information Technology Industry Council ("ITI"), for which I serve as chair of the Intellectual Property Committee. I am also the Director of Intellectual Property for Silicon Graphics, Inc., the world leader in high performance and visual computing, based in the heart of Silicon Valley. As an electrical engineer and registered patent attorney, I am responsible for making sure Silicon Graphics' valuable intellectual property is adequately developed and well protected.

ITI applauds your efforts, Mr. Chairman, in bringing to bear the collective expertise of this Committee on the question of whether to ratify the WIPO Copyright

Treaty and the WIPO Performances and Phonograms Treaty. Ratification of these Treaties, as well as balanced implementation of their obligations in the U.S. and other countries, are crucial steps to ensuring proper protection for intellectual property in the digital age. ITI wholeheartedly supports the Treaties' ratification and implementation. As producers of our own intellectual property, ITI's members believe that strong intellectual property protection is an indispensable element of the expansion of electronic commerce.

Thus far, the House and the Senate have each passed legislation to implement the WIPO treaties. While the two versions differ slightly and must be reconciled before enactment, leaders in both chambers have worked hard to write balanced and thoughtful implementing bills. This is especially important because the United States is poised to become one of the first countries to ratify the new treaties and governments around the world will be watching closely to see how our government implements its obligations under the Treaties.

I will make several recommendations today on how to complete the important work of implementing these treaties. Most importantly, though, I will emphasize the importance of ratifying the treaties and enacting the implementing legislation as one of the most important tasks of the 105th Congress.

II. Contributions of the Information Technology Industry

ITI represents this nation's leading providers of information technology ("IT") products and services. In fact, the United States IT industry is the key to this nation's technological leadership and a primary engine for national economic growth. In 1997, ITI's members had worldwide revenues of over $420 billion and employed more than 1.2 million people in the U.S. Revenues for the broader U.S. IT industry exceeded $804 billion, which amounted to 80 percent of the total worldwide IT market. ITI member companies are responsible for more than 16% of all U.S. industrially-funded research and development and over 50% of all IT research and engineering.

The IT industry is responsible for some of our economy's most valuable inventions, which have improved productivity, efficiency and quality of life, such as the solid state transistor, the integrated circuit, the personal computer, computer animation, the microprocessor, the cellular phone, the compact disc and the digital versatile disc (DVD). Through our investments in research and innovation, we drive the development of technologies that make the Internet possible and improve the quality of life at all levels.

III. The Significance of the WIPO Copyright Treaties

The WIPO Copyright Treaties underscore the importance and value of intellectual property in the new global economy. The fact that more than 70 countries signed the Treaties in December 1996 is extremely significant as a worldwide recognition of the economic value of creativity, innovation and intellectual capital as the essential foundations of the digital economy. By taking a leadership role in ratifying the Treaties and advocating their adoption by other countries, the United States will help the digital revolution reach its full potential.

ITI's primary interest in the Treaties themselves and the implementing legislation is in promoting the right balance—inherent in all intellectual property law—that will provide the greatest incentive for innovation. It is historically compelling that the birth place of Silicon Valley in Palo Alto, California is the garage where Dave Packard and Bill Hewlett made their first product in 1938: an audio oscillator which they sold to Walt Disney to be used in making the animated movie *Fantasia.* This is one of the first of many examples of the long symbiotic relationship between the content industries that produce movies, sound recordings, software, etc. and the information technology industry that builds products to create, deliver and extend the capabilities of such content.

A truly wide-angled perspective on the nature of creativity and innovation will recognize the need to preserve the relationship and balance between these two industries. One of the major purposes of the Treaties is to facilitate the use of technological solutions to address digital piracy on the Internet and in other fora.

Such technological solutions will inevitably involve the cooperation of the technology providers themselves—the IT industry. In pursuing this new approach, there is a delicate balance to be maintained because it is actually possible, in the worst of circumstances, to make innovation in one sector difficult through our efforts to protect intellectual property in another sector. In other words, our good faith efforts to protect movies, recordings and similar copyrighted material must not have the unintended effect of actually restricting innovation in the IT industry.

The U.S. Constitution, in Article 1, Section 8, gives Congress the power to create intellectual property in the following way:

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

Note that the goal of the Framers was to promote progress. As technology advances and the assumptions of previous laws must be reexamined and adjusted to the exigencies of the digital age, it is not always immediately clear which policies will best promote that progress. Striking the right balance is particularly important to ITI and its members because most of our member companies create both "content" in the form of software and other works of authorship as well as the "hardware" to deliver that content. In wrestling with these complex issues, ITI has developed the following principles that we believe should govern any legislation implementing the WIPO Copyright Treaties:

1. Intellectual property should be strongly protected domestically and internationally.
2. Whenever possible, rely on strong enforcement of existing copyright laws.
3. Regulate behavior, not technology. Legislation should focus on the intent to infringe, not on the provision of technology that could be used to infringe.
4. Do not harm the IT innovation engine, which is a key building block for economic growth and provides the tools and infrastructure that makes the GII possible.
5. Promote, rather than stifle, innovation.
6. Maintain the proper balance, inherent in the Constitution, between the protection of intellectual property and the promotion of innovation.
7. View technology as an opportunity, not a threat. Technology not only provides mechanisms for distributing content and generating revenues, it enables creative and effective solutions to protect intellectual property.
8. Remember, IT companies are content providers as well as technology providers. There are many synergies to be gained from working with content providers to develop mutually beneficial solutions. In fact, there are so many synergies that some companies have both content divisions and IT divisions, a convergence that is likely to grow.

IV. WIPO Implementation in the United States

For the IT industry, the most important choice the U.S. Congress will make with regard to these Treaties is how to implement Article 11 of the WIPO Copyright Treaty, which states:

> Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty of the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Happily, the vast majority of work towards a balanced implementation of Article 11 has already taken place. The House and Senate have already passed implementing bills that need only be reconciled and resubmitted before sending the bill to the President for his approval and both recognize the importance of a balanced implementation of Article 11.

As ITI's principles indicate, our member companies were originally opposed to an implementation that restricted, not only the act of circumvention, but also products, devices and technologies that could be used to circumvent the "effective technological measures" referred to in Article 11. We believed that designating certain technologies as "good" or "bad" was inappropriate because it could stifle innovation and unfairly target multi-use computers and other legitimate products that were never designed to aid infringement. Additionally, such an approach would resonate around the world as other governments looked to the U.S. for guidance in implementing Article 11.

As these bills have moved through Congress, however, this association agreed to significant compromises to accommodate the concerns of the copyright industries. Our current position is not to oppose the technology-based implementation of Article 11, but to identify the essential elements to a balanced implementation if the legislation must focus on technology. Specifically, we believe the anti circumvention provisions of the Digital Millennium Copyright Act must contain the following elements:

1. The "no mandate" provision

The "no mandate" has already been included in H.R. 2281 and S. 2037 to modify the "anti-circumvention" provisions and make clear that manufacturers of legitimate

information technology and consumer electronics devices will not be bound by law to respond to each and every specific technological protection measure created to protect copyrighted materials.

This provision is significant because the managers of ITI's member companies are loathe to tell their engineers and scientists that, rather than seeking to build the fastest, most powerful and consumer-responsive products possible, they must instead design the next generation of products with lawyers at their side, carefully responding to burdensome technological measures from a myriad of content industry niches. Such an environment would draw energy away from true innovation and create the continual possibility of liability for failure to respond to unknown technological protection measures.

ITI specifically urges the conference committee on the implementing legislation to adopt the House version of the "no mandate" provision, which we believe states the Congressional intention clearly without prejudicing the interests of movie studios, recording companies or other copyright industries.

2. Definition of "effective technological protection measures"

If certain devices are to be outlawed because of their capability to circumvent "effective" technological protection measures, it is only fair to define "effective" measures by specifying that they must be strong, "active" measures, such as encryption or scrambling, which obscure the content itself. If "passive" technological protection measures, such as "don't copy" messages, were covered, IT products would then have to look for these messages, in all their various permutations, in every file or program. The IT industry has determined that it is extremely difficult from an engineering and technology standpoint to implement these types of "passive response" schemes in personal computers without significant performance degradation. These systems are also simple for users to bypass.

Implementing legislation that did not draw a clear distinction between "effective" technological protection measures and all others would leave us with a Hobbesian choice of producing slow, "legal" computers or fast, "illegal" computers. For this reason, ITI urges the conference committee to include language in its report that explains the term "effective technological protection measures" and draws the distinction between "active" and "passive" measures.

3. Computer Security

There is some danger that, as the implementing legislation is currently drafted, traditional computer security measures, such as "firewalls" or password protection, could be construed to be technological protection measures under the bill's anti-circumvention provisions. If this happened, the potential liability could chill legitimate computer security testing and the security of all computer systems would ultimately suffer. For this reason, ITI supports a clarification in the conference committee report that says the anti-circumvention provisions of the Treaties and implementing legislation do not apply to traditional computer security measures.

4. Technological protection measure terminology

The House and Senate versions currently differ in the term they use to refer to technological means used by copyright owners to protect their material. The Senate version refers to "technological protection measures," while the House version refers to "technological measures." Between these two, ITI believes the Senate term provides more clarification and guidance to a court that must apply the legislation to a specific set of facts. In reconciling the House and Senate versions, we would urge Congress to adopt the Senate version.

V. Conclusion

ITI strongly supports ratification of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty as well as swift enactment of the Digital Millennium Copyright Act to implement this country's obligations under the treaties. We urge the Foreign Relations Committee to recommend prompt ratification by the full Senate. We also urge the leaders of both chambers and the members of the conference committee, should one be appointed, to quickly adopt a balanced implementing bill. By updating intellectual property law around the world for the digital revolution, the WIPO Copyright Treaties will lay a strong foundation for electronic commerce and ultimately improve the economies of this nation and the world. Thank you for considering our views on this important issue.

Senator HAGEL. Let me now introduce the senior Senator from Maryland, our colleague Senator Sarbanes. Welcome.

Senator SARBANES. Well, thank you very much, Mr. Chairman. Unfortunately, I am confronted with the usual conflicts and I am not going to be able to stay.

But, first of all, I want to commend you for holding this hearing. I think this is a very important issue. And I want to thank the panel for their testimony. I will just make a couple of observations.

First of all, this effort to strike a proper balance between the rights of the creative artists, the authors, and the performers, without whom there would be no products—I mean, they are, as it were, the originators of it all. And, obviously, their efforts need to be protected and rewarded.

And at the same time to make it possible for libraries and schools and other similar institutions to make appropriate use of this without being, in effect, hamstrung or undergoing an impossible financial burden. It is always a difficult question on these issues.

Obviously, there are some important matters to work through here. I am a little puzzled that since everyone supports the treaties—as I understand it, both the holders and the users of copyrights are in support of the treaties. So the treaties have obviously struck what people are prepared to accept as an appropriate balance, weighing all of these interests.

I have a little difficulty in understanding then why were are not able to develop implementing legislation for the treaties on which everyone agrees that are within the parameters of the treaties rather than apparently going outside those parameters.

If there was not agreement on the treaties, it would be a more complicated problem. But since apparently there is agreement on the treaties—everyone says Well, the treaties are OK. We ought to approve and ratify the treaties. So, obviously, that negotiating process arrived at a package that people perceive as acceptable.

Now, just as a matter of deduction, so to speak, if we keep the implementing legislation within the parameters of the treaties, we ought to be able to have implementing legislation which everyone says, Well, yes, that implements the treaties and, therefore, since we are for the treaties, we are for the implementing legislation.

Now, apparently we do not find ourselves in that situation. It seems to me that is the challenge that we have to address. And I gather—I have not had a chance to look carefully at the House revisions, but I gather some of them wander—I mean, are not even essentially on the same playing field or, if so, only remotely related.

So I think this is an important hearing. And I do not know what the time constraints are on us on whether we are going to be able to work through it. But I think if we come at it that way, we might be able to reach a solution that is generally acceptable.

Thank you, Mr. Chairman.

Senator HAGEL. Senator Sarbanes, thank you.

Why do we not do this, since I think you have touched on some of the key issues here, I might, Senator Feinstein, if it is all right, just roll on down to you. Because you were involved, I suspect, in some of these issues on the Judiciary Committee and might well wrap some of this together.

Because I think you are right, Paul, and I said before you go there that the Chairman, Chairman Helms, would like to move on

this, but he does not want to get this out ahead of the implementing legislation. So without implementing legislation I do not think we will be able to move on this. That is what I think the Chairman's baseline is here.

Thank you. Senator.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

As I indicated in my opening comments, with respect to the implementing legislation, I had thought some of these problems had been worked out. As the Professor testified, I gather the problems center around the fair use and the data base protection acts inclusion in the implementing legislation.

I just received a copy of a letter sent to Chairman Hatch, with a copy to ranking member Leahy, dated today, which contains the signatures of 38 corporations and organizations which are the consumers and producers of data bases.

And, essentially, what they say is—and the problem is with the implementing legislation. I would be hopeful that the treaty could go ahead and that we could solve some of these remaining problems.

They point out that the concern is the inclusion of the data base protection legislation as Title Five of the Digital Millennium Copyright Act. And they also say that—I had thought that there had been some consensus reached in the discussions which were really lead by Senator Hatchs staff and took some 35 hours.

They say there was no consensus and that they are essentially far apart. Some of the parties are present in the audience that I had convened in Los Angeles between the American Library Association and the universities and the phone companies. But, essentially, what they are urging Chairman Hatch to do is eliminate any new form of data base protection and defer Judiciary Committee consideration of S–2291 or data base protection until the 106th Congress, to request a GAO assessment of the economic impact of 2291, and to schedule at least one Judiciary Committee hearing on this issue prior to marking up any data base protection legislation until next year.

Let me just begin by asking the Professor, and perhaps Mr. Byrne, do you see, if that were to be sort of the modus operandi, any objection to proceeding with ratification of the treaty right now in this session?

Mr. JASZI. With respect to data base, I think that deferring consideration of that very difficult and highly contested issue to the next Congress when it could be given a full hearing would be an optimal solution.

As I testified earlier, the Digital Future Coalition has other concerns with the implementing legislation. There are additional extraneous provisions in the House legislation beyond the data base provisions, which we describe at somewhat greater length in a letter that was sent a few weeks ago to all members of the Senate and a copy of which is attached to my statement.

But, as you yourself pointed out, we also have deep concerns about the failure of the Senate version of the implementing legislation to deal adequately with the preservation of balance and the maintenance of a strong and vital fair use doctrine.

We believe that modifications need to be made in Section 1201(a)(1), which deals with individual circumvention conduct, and that, in addition, the approach of the House-passed HR–2281 to the regulation of devices capable of being employed for circumvention purposes represents a desirable approach, in the regard especially that Chris pointed out, that is contains an absolutely unambiguous version of the so-called no mandate provision.

Senator FEINSTEIN. Mr. Byrne, do you want to add to that, or do you agree?

Mr. BYRNE. Well——

Senator FEINSTEIN. And do you think we could ratify this treaty and then deal with the implementing legislation separately?

Mr. BYRNE. I can give you the ITI position on that, and that is—I would like to qualify it a little bit. And I think if ITI had to have a sign of the zodiac, it would probably be Libra.

And the reason for that is because the nature of our membership is such that we are very sympathetic to the issues of all the parties at the table. And to address in some respects the concerns of the previous gentleman who was questioning why, if we all agree to the treaty as a good thing, are we having problems implementing it. And I think it just has to do with the altitude at which the treaty was written versus the altitude at which we are going to have to implement this thing.

And ITI's concerned with the approach has been, fundamentally, that we are going at this as if technology was a problem, technology was a threat to our intellectual property. And what we would like to believe is that technology is in fact probably neutral, and ultimately a very positive opportunity.

But at the same time, we are very cognizant of the value of intellectual property and we support protecting it. So, at this time, we are very much in favor of ratification of the treaty.

And we understand how complicated it is to implement this thing. But given all of the work that has gone into it and the balance that we have been able to achieve to-date, I think ITI would be remorseful if we could not make progress in moving forward.

Senator FEINSTEIN. Thank you. Mr. Neel, do you have a comment on this point?

Mr. NEEL. Well, two points, Senator. One, the ad hoc Copyright Coalition, which includes all the carriers, the telephone companies, the long distance and local companies, the Internet service providers, on-line and so on, we would strongly object to the decoupling of the implementation legislation and the treaty. That would represent a disaster for the evolution of the Internet economy.

I will also point out that the companies——

Senator FEINSTEIN. Could you clarify that? When you use the word decoupling——

Mr. NEEL. Title One and Title Two.

Senator FEINSTEIN.—are you saying you do not want us to ratify the treaty now?

Mr. NEEL. Without enacting Title Two, which is the implementing legislation that deals with service provider liability issues which are absolutely critical.

Of course, we want the treaty ratified. But it must be connected to Title Two of this legislation. It is absolutely critical. It is a very

important issue. The Chairman spoke of this in his opening statement. And I think it is exactly the right way to go.

The objection to the data base provision that you have referred to and has been discussed here is Title Five——

Senator FEINSTEIN. Right.

Mr. Neel:—that you are dealing with. Most of the companies that expressed their opposition to Title Five have no objection to Title Two and, in fact, support Title Two, and support the linkage of the two. I would not want to speak for everyone personally.

But that is our point in this. We have no dog in that fight on data base in Title Five. But we would strongly encourage the linkage of Title One and Title Two and would fight with every tool we have to decouple Title One and Title Two, because they ultimately could take down the entire process.

Senator FEINSTEIN. You know, we might want to consider—I wrote a letter to Chairman Hatch earlier urging that we have a hearing on the data base and Title Five effort. That hearing did not take place, as has been pointed out.

I would really think we should go ahead with the treaty if there is a way of separating out from the implementing legislation Title Five, having the hearing, doing it in the next session, and moving ahead with the other titles in this session. Perhaps we should consider that. If I could just ask you to reflect on that suggestion, as to what you think about it, I would appreciate it.

Mr. NEEL. Senator, not to be presumptuous, the others have a bigger stake in that. But you are suggesting taking out Title Five. That is a part of the implementing legislation. Is that right?

Senator FEINSTEIN. Well, if we just delay it until we can have the hearing——

Mr. NEEL. Title Five.

Senator FEINSTEIN.—and make any necessary refinements, because there has not been a hearing.

Mr. VALENTI. Mr. Chairman, may I just say something? This is not the forum to debate the implementing legislation. It is horrifyingly complex. I cannot tell you of the hundreds of hours that I and my colleagues, Roy and others, have been involved in negotiating with various groups. It is an enigma wrapped in a mystery inside a phantom. And there is no way you can deal with it in this forum.

Senator Feinstein says let us simplify this. The treaty ought to be ratified now. Why? Because we are the largest beneficiary. If we do not ratify, why on earth should any other country in the world ratify? We are the legatee of all of its benefits. We dominate the world. And if we are pussyfooting around on ratifying this treaty, that sends the wrong signal around the world.

But the entrails of the treaty do not go into effect until implementing legislation takes place. Let us not complicate this thing, Mr. Chairman. I do not want to get involved with any of the things with some of my compatriots at this table, because this is not the forum.

There is no way that this committee is going to understand all of the squiggly little things that go into make up the body, a final compromise that has been made. The Judiciary Committee has the

expertise in both Houses to do this. A conference is now being assembled. They are going to work this thing out.

If data base is held over—as Roy says, I do not have a dog in that fight either. If it is held over, the world will not come to an end. But what is singularly important, Mr. Chairman, please do not delay the ratification of this treaty. It is sending the wrong message to the world.

Senator FEINSTEIN. I think Jack is right. This is not the place to do it. And it is very difficult. And I saw that firsthand in trying to reconcile some of these interests. I do not know whether it can be done in conference or not, Mr. Chairman.

But I strongly feel that Mr. Valenti is correct, that we have to move ahead and ratify this treaty. And I certainly offer, you know, to work and try to reconcile the concerns with the hope that it can be done in conference. If not, I think the way I suggested earlier, moving with some of the implementing legislation and not the whole thing right now might be the way.

Mr. VALENTI. If I may say one thing.

Senator HAGEL. Mr. Valenti.

Mr. VALENTI. I think process and procedure is sacred in the Congress. You cannot function any other way. Procedure says the Judiciary Committees have supremacy in this matter. In the House, the Commerce Committee took a sequential referral on this.

It has been debated. It has been examined. It has been prayed over. And we have even had witch doctors called in to tell us which way to pray on that particular day.

But the Judiciary Committees have the authority and the mandate from the Congress to work this out. This is their turf. And let the process and the procedure work its way. What this committee can do, and I pray Mr. Chairman, ought to do, is ratify this treaty.

The ratification does not do anything except we accept the premises of the treaty. Now it is the duty of the Congress, through their Judiciary Committees, to work out how that treaty can be inserted into U.S. Law. There is a marvelous simplicity about that. And it ought to be followed.

But, again, I urge you, please do not delay the ratification of this treaty, else it halts the whole advance forward of world ratification of this treaty.

Mr. JASZI. Mr. Chairman, if I may.

Senator HAGEL. Professor Jaszi.

Mr. JASZI. In Geneva, in December 1996, it was possible for the nations of the world to arrive at the remarkable consensus that they achieved and to which Senator Sarbanes referred earlier precisely because the mandates of the treaty are general and permissive in nature, and because the treaties clearly incorporate and recognize, as I mentioned in my statement earlier, the principle of balance.

I think for that reason that we need to recognize that there is real domestic dispute about the meaning of those treaty mandates as they will be localized in U.S. Law, a dispute that has to some extent been reflected in the testimony today.

I think, for that reason, that it is essential to maintain a linkage between ratification and implementation. Because if we ratify before we implement these treaties, we will do so, in effect, without

any knowledge of what that ratification means for domestic information producers, and especially domestic information consumers.

The treaties look forward to ratification, and I think this committee has a serious and important role to play in assuring that the implementing legislation is undertaken in a way that is consistent with the spirit of those treaties.

Senator HAGEL. Mr. Byrne, did you have an additional comment?

Mr. BYRNE. I think we just wanted to reiterate that I think the opportunity and the mandate for U.S. Leadership here is very evident. And we would like to think that that leadership will manifest itself both in terms of ratification and in balanced implementation ideally.

Senator HAGEL. Mr. Neel.

Mr. NEEL. The only thing I can say is the obvious, to reaffirm what you said in your opening statement, that Title One and Title Two must be linked. We must pass them both. There is total agreement on Title Two. There appears to be virtually total agreement on Title One, which is the ratification of the treaty. It is critical.

If we do not get it done this year, in the last days of this Congress, it is hard to imagine when we can get this done next year.

Senator HAGEL. Well, we have an amazing consensus here, do you think, Senator?

Senator FEINSTEIN. Yes.

Senator HAGEL. In fact, we were just speaking briefly. Senator Feinstein has, as you have heard, had the unique perspective of coming at this both from a member of the Judiciary Committee as well as a member of this committee.

I think until we have a chance to discuss this with Chairman Helms and Senator Biden and other members of the committee, which we will do—and, obviously, what we have heard this morning has added an important dimension to this.

We understand the timeliness. We understand the complications. I think the point has been made rather clearly, as Senator Feinstein said, that this is a complicated process. Jack Valenti said it well. If you start to unravel this, we may never find the end of the string here. And, certainly, this committee is not in a position to do this, nor this forum.

Let me suggest this. As I stated, we will take back to our ranking members, Senator Biden and Chairman Helms, the information that has been offered today, the concerns that you have, which are real. And I think it is in the best interest of our country, as expressed by each of you and by the Senators here today, that we get this done. But we have to do it the right way, obviously, and protect the interests of everyone here in our country first.

Senator Feinstein, do you have any final comments on this? I do not know if there is any point really in going through the mechanism of some of the more general questions. I think we have really hit on the real issue here as to what has to happen in order to move forward.

Are there any last comments? Jack, would you like to offer anything, or Roy, or anybody else?

Mr. VALENTI. No. I hope I have made clear what my position is.

Senator HAGEL. Rather plainly, Jack. It is that Texas directive. Thank you.

Mr. Neel, is there anything else? Professor?

Mr. JASZI. Only to say, as I omitted to before, that the Digital Future Coalition is strongly in support of the Title Two OSP provisions and feels, as does Mr. Neel and his organization, that it is extremely important that those provisions be incorporated in any implementing legislation.

Senator HAGEL. Mr. Byrne.

Mr. BYRNE. It is just a privilege to be here, and we appreciate your help.

Senator HAGEL. Well, thank you all for your contributions. They have been important. And we will work mightily to get this done. Thank you.

[Whereupon, at 11:25 a.m., the hearing was adjourned.]

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