H. R. 5522

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

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 2, 2002

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

A BILL

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

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

SECTION 1. SHORT TITLE.

This Act may be cited as the “Digital Choice and
Freedom Act of 2002”.

SEC. 2. FINDINGS.

The Congress makes the following findings:

(1) The law of copyright is often described as
a “difficult balance between the interests of authors
... in the control and exploitation of their writings
. . . on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.” Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

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

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

(4) Advances in technology have often prompted changes to the copyright laws to maintain the balance. For example, the development of player pianos preceded the enactment of the Copyright Act of

(5) The development of digital technology and the rise of the Internet have once again altered the balance. On the one hand, digital technology threatens the rights of copyright holders. Perfect digital copies of songs and movies can be publicly transmitted, without authorization, to thousands of people at little or no cost. On the other hand, technological control measures give copyright holders the capacity to limit nonpublic performances and threaten society's interests in the free flow of ideas, information, and commerce.

(6) The Digital Millennium Copyright Act (“DMCA”) was enacted as an attempt to safeguard the traditional balance in the face of these new challenges. It gave copyright holders the ability to fight digital piracy by employing technical restrictions that prevent unlawful access and copying. In practice, however, the DMCA also endangered the rights and expectations of legitimate consumers.

(7) Contrary to the intent of Congress, section 1201 of title 17, United States Code, has been interpreted to prohibit all users—even lawful ones—from
circumventing technical restrictions for any reason. As a result, the lawful consumer cannot legally circumvent technological restrictions, even if he or she is simply trying to exercise a fair use or to utilize the work on a different digital media device. See, e.g., Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 321–24 (S.D.N.Y. 2000) (DMCA failed to give consumers the technical means to make fair uses of encrypted copyrighted works).

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

(9) It is now necessary to restore the traditional balance between copyright holders and society, as intended by the 105th Congress. Copyright laws in the digital age must prevent and punish digital pirates without treating every consumer as one.
SEC. 3. PROTECTING FAIR USE AND CONSUMER EXPECTATIONS IN THE DIGITAL WORLD.

(a) Fair Use.—The first sentence of section 107 of title 17, United States Code, is amended by inserting after “or by any other means specified in that section,” the following: “and by analog or digital transmissions.”

(b) Permissible Uses of Digital Works.—

(1) In general.—Chapter 1 of title 17, United States Code, is amended by adding after section 122 the following:

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

“(a) Use of Lawfully Obtained Digital Works.—Notwithstanding the provisions of section 106, it is not an infringement of copyright for a person who lawfully obtains a copy or phonorecord of a digital work, or who lawfully receives a transmission of a digital work, to reproduce, store, adapt, or access the digital work—

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

“(2) in order to perform or display the work, or an adaptation of the work, on a digital media device, if such performance or display is not public.
“(b) Effect of Licenses.—When a digital work is distributed to the public subject to nonnegotiable license terms, such terms shall not be enforceable under the common laws or statutes of any State to the extent that they restrict or limit any of the limitations on exclusive rights under this title.

“(c) Definitions.—As used in this section, the following terms have the following meanings:

“(1) A ‘digital work’ is any literary work (except a computer program), sound recording or musical work, or a dramatic work, motion picture, or other audiovisual work, in whole or in part in a digital or other nonanalog format.

“(2) A ‘digital media device’ is any hardware or software that converts copyrighted works in digital form into a form whereby the images and sounds are visible or audible, or retrieves or accesses copyrighted works in digital form and transfers or makes available for transfer such works to such hardware or software.

“(d) Construction.—Nothing in this section shall enlarge or diminish any of the other limitations on exclusive rights contained in this title, including any limitations that relate to archival activities by a library or an archives under sections 107 and 108.”.
(2) Conforming Amendment.—The table of sections for chapter 1 of title 17, United States Code, is amended by adding at the end the following new item:

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

SEC. 4. DIGITAL FIRST SALE.

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

“(f) The privileges prescribed by subsections (a) and (c) apply where the owner of a particular copy or phonorecord of a work in a digital or other nonanalog format, or any person authorized by such owner, sells or otherwise disposes of the work by means of a transmission to a single recipient, if the owner does not retain his or her copy or phonorecord in a retrievable form and the work is sold or otherwise disposed of in its original format.”

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

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

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

(2) by inserting after subsection (b) the following:

“(c) Circumvention for Noninfringing Uses.—

(1) Notwithstanding any other provision in this title, a
person who lawfully obtains a copy or phonorecord of a
work, or who lawfully receives a transmission of a work,
may circumvent a technological measure that effectively
controls access to the work or protects a right of the copy-
right holder under this title if—

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

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

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

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

“(B) such means are designed, produced, and
marketed to make a noninfringing use under para-
graph (1)(A); and
“(C) the copyright owner fails to make available the necessary means referred to in paragraph (1)(B).”.