EXTENSIONS OF REMARKS

TELECOMMUNICATIONS ACT OF 1996

HON. JOHN SHIMKUS

OF ILLINOIS

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 12, 1998

Mr. SHIMKUS. Mr. Speaker, two years ago this week, after literally years of intense and contentious debate, the President signed into law the Telecommunications Act of 1996. Passage of this landmark legislation represented the largest overhaul of our nation's communications laws in more than 60 years. The Telecommunications Act was intended to remove long standing monopoly protections to allow customers to get long-distance service from their local phone company or local phone service from their long-distance or cable company. This historic new law would also permit customers to get many communications services—local and long distance phone service, cable and cellular service—from one company on one bill.

Many in Congress hailed this new law as the ''greatest jobs bill of the decade.'' The President praised the law saying ''customers will receive the benefits of lower prices, better quality and greater choices in their telephone and cable service, and they will continue to benefit from a diversity of voices and viewpoints in radio, television and the print media.''

Unfortunately, Mr. Speaker, it's two years later and consumers have yet to see most of the benefits. What they do see are mergers and lawsuits filed by frustrated would-be competitors. Thus far the Federal Communications Commission has rejected bids by three of the former Bell Companies seeking to enter the long-distance market. In many areas, cable rates have risen and potential new competitors struggle to secure the necessary programming which is critical to their survival and growth.

The FCC has a new Chairman and three new commissioners. While I am encouraged by their public statements pledging to move forward with implementation of the Act—I am disappointed in the fact that little, if any, progress has been made. There is absolutely no reason why Americans can't start realizing the benefits of the Telecommunications Act now.

JAPAN'S OPEN MARKET COMMITMENT

HON. BOB SCHAFFER

OF COLORADO

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 12, 1998

Mr. BOB SCHAFFER of Colorado. Mr. Speaker, I rise to express my strong support for the U.S. Trade Representative's announcement of February 3, 1998, regarding Japan's Open Market Commitment. This is the first time the United States has held Japan to its publicly-stated commitments concerning its photographic film and paper market. Eastman Kodak Company, one of America's most reputable companies, has maintained a market presence in Japan for over a century. Yet in all that time, Kodak has never received fair access to consumer markets. Kodak has consistently been forced to contend with an elaborate system of unfair and arbitrary trade barriers created by a close alliance between Japanese business and Japanese government entities. These market arrangements are aimed specifically at nurturing domestic producers at the expense of consumers and U.S. competitors. The U.S. Trade Representative's statement regarding Japan's Open Market Commitment is a clear sign that the anti-U.S. trade conditions in Japan are no longer acceptable.

Asia's current economic challenges and subsequent failures are a direct consequence of the flawed Asian economic model inspired and popularized by Japan. Japan's tradition of controlling its economy and favoring specific producers has been duplicated in countries like Korea, Indonesia and Thailand, and is now being exposed as a prescription for economic failure. Japan's economic instability is demonstrated by the collapse of its fourth-largest securities firm and tenth-largest bank within days of each other. Equally, its financial crisis has brought to light far-reaching government corruption, including a scandal which forced the resignation of Finance Minister Heroshi Mitzuka, the most powerful member of the Japanese cabinet, as well as the arrests of two of his senior ministry officials. These developments expose ever-widening collusion between the Japanese government and specific Japanese businesses. These economic and financial crises stem from Japanese inflexibility, resistance to change, and the exclusion of foreign competitors.

Japan's Open Market Commitment directly addresses the need for economic flexibility and open competition. It insists Japan fulfill its publicly-stated commitments to open its markets, to increase competition, and to end control of its economy by powerful bureaucrats. Rather than government officials bent on dictating unrealistic economic outcomes, Japan's economy must be led by free market discipline.

TRIBUTE TO ELIZABETH HEFLIN-McCLOUD

HON. SANDER M. LEVIN

OF MICHIGAN

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 12, 1998

Mr. LEVIN. Mr. Speaker, I rise today to honor the memory of Mrs. Elizabeth Heflin-McCloud, a Royal Oak Township Trustee. Mrs. McCloud died in her home on January 6, 1998.

Born in Talladega, Alabama in 1918 to Oscar and Littie Ywyman, Mrs. McCloud later moved to Michigan. Here, through her association with many community and civic organizations, Mrs. McCloud made a difference in the lives of so many people. She served on the Library Board, Oakdale Activity Committee, New Mount Vernon Church, Business and Professional Women, AFL–CIO, Community Development Block Grant, Township Beautification Committee, and the Democratic Club of Ferndale and Royal Oak Township.

After working 38 years at Chrysler Corporation, Mrs. McCloud decided to enter public service, and served as a Royal Oak Township Trustee from 1992 to the present. She was a friend of so many people and of so many causes.

I ask my colleagues to join me as we extend our sincere sympathy to the friends and relatives of Mrs. McCloud who will always be remembered for her outstanding contributions to the world around her.

JOHN TRACY, KERN COUNTY CATTLEMAN OF THE YEAR

HON. WILLIAM M. THOMAS

OF CALIFORNIA

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 12, 1998

Mr. THOMAS. Mr. Speaker, I am proud to have this opportunity to recognize John Tracy of Buttonwillow, California. John Tracy, a fourth generation Kern County rancher, is the recipient of the 1998 ''Kern County Cattleman of the Year'' award. Kern County is one of the country's biggest agricultural counties, and cattle are one of Kern's most important products.

The Tracy family has been in Kern County over 120 years, and John is carrying on in his family's footsteps. John took over running his family's ranch when he was just 22 years old, after the death of his father. Armed with a Bachelor of Science in farm management from Cal Poly, Mr. Tracy carried on his family's proud heritage and made many innovations in the ranch's operation. Among these were reorganizing his cow-calf grazing operation into an intensive feedlot enterprise and using agricultural by-products in a scientifically balanced nutrition program, thus making conservation and recycling work.

Since taking over his family's operation nearly 30 years ago, John Tracy has become an integral and active part of the agricultural community in Kern County. He has been director of both the Kern County Cattlemen's Association and the California Beef Council. The work of John and his family with the Kern County Fair's Junior Livestock Auction has made him an outstanding role model, as well as for the young people of Kern County.

John Tracy has earned the respect and admiration of his peers and of his neighbors. He has served as Buttonwillow's honorary Mayor and last year received the Buttonwillow Peace Officers Recognition of Merit. He has been described by other ranchers as ''a 21st century businessman with 19th century cattleman values.''

As director of the California Cattlemen's Association, he has worked on behalf of other cattlemen against the inheritance tax, so that family farms, like his own, can be passed from one generation to the next. He has also worked for grazing and endangered species reform. I sometimes think that people like John Tracy should be at the top of the nation's endangered species list; he is a family rancher, struggling against nature, a tough economy, and federal encroachment, while trying to keep his family's proud heritage intact so he can pass it to the next generation.

I congratulate John Tracy on being Kern County's Cattleman of the Year.

INTRODUCTION OF THE ''ON-LINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION ACT''

HON. HOWARD COBLE

OF NORTH CAROLINA

IN THE HOUSE OF REPRESENTATIVES

Thursday, February 12, 1998

Mr. COBLE. Mr. Speaker, The ''On-Line Copyright Infringement Liability Limitation Act'' is being introduced to address concerns raised by a number of on-line service and Internet access providers regarding their potential liability for copyright infringement when infringing material is transmitted on-line through their services. While several judicially created doctrines currently address the question of when liability is appropriate, providers have sought greater certainty through legislation as to how these doctrines will apply in the digital environment.

In July of last Year, Chairman HENRY HYDE and I introduced a bill, H.R. 2180, to begin the discussion in this Congress on this issue. Since that time, the Judiciary Subcommittee on Courts and Intellectual Property, which I chair, has held two legislative hearings on that bill. In addition, Representative BOB GOODLATTE of Virginia, a senior Member of the Subcommittee, has invested months of his time leading negotiation sessions between on-line service and Internet access providers, telephone companies, libraries, universities and copyright owners.

This bill is the result of those hearings and negotiation sessions and represents a common base from which to begin the markup process. It does so by codifying the core of current case law dealing with the liability of on-line service providers, while narrowing and clarifying the law in other respects that all parties agree should be addressed.

This bill offers the advantage of incorporating and building on those judicial applications of existing copyright law to the digital environment that have been widely accepted as fair and reasonable. The bill takes a minimalist approach, and has been drafted in as simple a manner as possible, imposing limitations on liability without reference to specific technologies, without detailed procedures and codes of conduct, and without setting out a long list of factors that must be met in order to qualify.

The bill distinguishes between direct infringement and secondary liability, treating each separately. This structure is consistent with evolving case law, and appropriate in light of the different legal bases for the policies behind the different forms of liability.

As to direct infringement, liability is ruled out for passive, automatic acts engaged in through a technological process initiated by another. Thus, the bill essentially codifies the result in the leading and most thoughtful judicial decision to date; Religious Technology Center v. Netcom On-line Communications Services, Inc. In doing so, it overrules those aspects of the Playboy v. Frena case, inasmuch as that case might apply to service providers, suggesting that such acts could constitute direct infringement, and provides certainty that Netcom and its progeny, so far only a few district court cases, will be the law of the land.

As to secondary liability, the bill changes existing law in two primary respects: no monetary relief can be assessed for the passive, automatic acts identified in Religious Technology Center v. Netcom On-line Communications Services, Inc., and the current criteria for finding contributory infringement or vicarious liability are made clearer and somewhat more difficult to satisfy. In a change from the bill as introduced, additional criteria are no longer included. Injunctive relief will, however, remain available, ensuring that it is possible for copyright owners to secure the cooperation of those with the capacity to prevent ongoing infringement.

Finally, the various safeguards that were included in the bill as introduced are incorporated in the substitute, as modified to reflect comments and suggestions submitted by interested parties. These safeguards include language intended to guard against interference with privacy; a provision ensuring that nonprofit institutions such as universities will not be prejudiced when they determine that an allegedly infringing use is fair use; a provision protecting service providers from lawsuits when they act to assist copyright owners in limiting or preventing infringement; and a provision requiring payment of costs incurred when someone knowlingly makes false accusations of on-line infringement.

SECTION-BY-SECTION ANALYSIS

Paragraph 512(a)(1) exempts a provider from liability on the basis of direct infringement for transmitting material over its system or network at the request of a third party, and for the intermediate storage of such material, in certain circumstances. The exempted storage and transmissions are those carried out through an automatic technological process that is indiscriminate—i.e., the provider takes no part in the selection of the particular material transmitted—where the copies are retained no longer than necessary for the purpose of carrying out the transmission. This conduct would ordinarily include forwarding of customers' Usenet postings to other Internet sites in accordance with configuration settings that apply to all such postings. It would also include routing of packets from one point to another on the Internet.

This exemption codifies the result of Religious Technology Center v. Netcom On-line Communications Services, Inc., 907 F. Supp. 1361 (N.D. Cal. 1995) (''Netcom''), with respect to liability of providers for direct infringement. See id. at 1368–70. In Netcom the court held that a provider is not liable for direct infringement where it takes no ''affirmative action that directly results] in copying . . . works other than by installing and maintaining a system whereby software automatically forwards messages received from subscribers . . . and temporarily stores copies on its system.'' By referring to temporary storage of copies, Netcom recognizes implicitly that intermediate copies may be retained without liability for only a limited period of time. The requirement in paragraph 512(a)(1) that ''any copy made of the material is not retained longer than necessary for the purpose of carrying out that transmission'' is drawn from the facts of the Netcom case, and is intended to codify this implicit limitation in the Netcom holding.

Paragraph 512(a)(2) exempts a provider from any type of monetary relief under theories of contributory infringement or vicarious liability for the same activities for which providers are exempt from any liability for direct infringement under paragraph 512(a)(1). This provision extends the Netcom holding with respect to direct infringement to remove monetary exposure for claims arising under doctrines of secondary liability. Taken together, paragraphs (1) and (2) mean that providers will never be liable for any monetary damages for this type of transmission of material at the request of third parties and for intermediate storage of such material. Copyright owners may still seek an injunction against such activities under theories of secondary liability, if they can establish the necessary elements of a claim.

Paragraph 512(a)(3) similarly exempts a provider from monetary relief under theories of contributory infringement or vicarious liability for conduct going beyond the scope of paragraph (1), where a provider's level of participation in and knowledge of the infringement are low. Such conduct could include providing storage on a server and transmitting material from such storage in response to requests from users of the Internet. In addition, the provision modifies and clarifies the knowledge element of contributory infringement and the financial benefit element of vicarious liability. Even if a provider satisfies the common-law elements of contributory infringement or vicarious liability, it will be exempt from monetary liability if it satisfies the criteria in subparagraphs (A) and (B). As under paragraph (2), copyright owners may still seek an injunction even if the provider qualifies for the exemption from monetary relief.

The knowledge standard in subparagraph (A) is nearly identical to that used in the bill as introduced, and is intended to be functionally equivalent. In addition to actual knowledge, it includes ''information indicating that the material is infringing.'' This would include a notice or any other ''red flag''—information of any kind that a reasonable person would rely upon. It may, in appropriate circumstances include the absence of customary indicia of ownership or authorization, such as a standard and accepted digital watermark or other copyright management information. As subsection (b) makes clear, the bill imposes no obligation on a provider to seek out such red flags. Once a provider becomes aware of a red flag, however, it ceases to quality for the exemption and, under existing law, it may have a duty to follow up.

This standard differs from existing law, under which a defendant may be liable for contributory infringement if it knows or should have known that material was infringing.

The financial benefit standard in subparagraph (B) is intended to codify and clarify the