

Communications Decency Act of 1995

TITLE V -- BROADCAST OBSCENITY AND VIOLENCE

Subtitle A Obscene, Harassing, and Wrongful Utilization of Telecommunications Facilities

SEC. 501. SHORT TITLE.

This title may be cited as the "Communications Decency Act of 1995".

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SEC. 509 ONLINE FAMILY EMPOWERMENT.

Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

SEC. 230 PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

(a) FINDINGS. The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY. It is the policy of the United States

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR 'GOOD SAMARITAN BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(1) TREATMENT OF PUBLISHER OR SPEAKER. No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY. No provider or user of an interactive computer service shall be held liable on account of

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) EFFECT ON OTHER LAWS.

(1) NO EFFECT ON CRIMINAL LAW. Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW. Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW. Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is in consistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW. Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) DEFINITIONS. As used in this section:

(1) INTERNET. The term 'Internet' means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE. The term 'interactive computer service' means an information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER. The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) ACCESS SOFTWARE PROVIDER. The term 'access software provider' means a provider of software (including client or server software), or enabling tools that do any one or more of the following

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward cache, search, subset, organize, reorganize, or translate content."

The Digital Millennium Copyright Act of 1998

An Act To amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes.

SECTION 1. SHORT TITLE.

This Act may be cited as the “Digital Millennium Copyright Act”.

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Sec. 1. Short title.

Sec. 2. Table of contents.

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TITLE I—WIPO TREATIES IMPLEMENTATION

SEC. 101. SHORT TITLE.

This title may be cited as the “WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998”.

SEC. 102. TECHNICAL AMENDMENTS.

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended—

(1) by striking the definition of “Berne Convention work”;

(2) in the definition of “The ‘country of origin’ of a Berne Convention work”—

(A) by striking “The ‘country of origin’ of a Berne Convention work, for purposes of section 411, is the United States if” and inserting “For purposes of section 411, a work is a ‘United States work’ only if”;

(B) in paragraph (1)—

(i) in subparagraph (B) by striking “nation or nations adhering to the Berne Convention” and inserting “treaty party or parties”;

(ii) in subparagraph (C) by striking “does not adhere to the Berne Convention” and inserting “is not a treaty party”; and

(iii) in subparagraph (D) by striking “does not adhere to the Berne Convention” and inserting “is not a treaty party”; and

(C) in the matter following paragraph (3) by striking “For the purposes of section 411, the ‘country of origin’ of any other Berne Convention work is not the United States.”;

(3) by inserting after the definition of “fixed” the following: “The ‘Geneva Phonograms Convention’ is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.”;

(4) by inserting after the definition of “including” the following:

“An ‘international agreement’ is—

“(1) the Universal Copyright Convention;

- “(2) the Geneva Phonograms Convention;
- “(3) the Berne Convention;
- “(4) the WTO Agreement;
- “(5) the WIPO Copyright Treaty;
- “(6) the WIPO Performances and Phonograms Treaty; and
- “(7) any other copyright treaty to which the United States is a party.”;

(5) by inserting after the definition of “transmit” the following:

“A ‘treaty party’ is a country or intergovernmental organization other than the United States that is a party to an international agreement.”;

(6) by inserting after the definition of “widow” the following:

“The ‘WIPO Copyright Treaty’ is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.”;

(7) by inserting after the definition of “The ‘WIPO Copyright Treaty’ ” the following:

“The ‘WIPO Performances and Phonograms Treaty’ is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.”;

and

(8) by inserting after the definition of “work made for hire” the following:

“The terms ‘WTO Agreement’ and ‘WTO member country’ have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act.”.

(b) SUBJECT MATTER OF COPYRIGHT; NATIONAL ORIGIN.—Section 104 of title 17, United States Code, is amended—

(1) in subsection (b)—(A) in paragraph (1) by striking “foreign nation that is a party to a copyright treaty to which the United States is also a party” and inserting “treaty party”;

(B) in paragraph (2) by striking “party to the Universal Copyright Convention” and inserting “treaty party”;

(C) by redesignating paragraph (5) as paragraph (6);

(D) by redesignating paragraph (3) as paragraph (5) and inserting it after paragraph (4);

(E) by inserting after paragraph (2) the following:

“(3) the work is a sound recording that was first fixed in a treaty party; or”;

(F) in paragraph (4) by striking “Berne Convention work” and inserting “pictorial, graphic, or sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party”; and (G) by inserting after paragraph (6), as so redesignated, the following:

“For purposes of paragraph (2), a work that is published in the United States or a treaty party within 30 days after publication in a foreign nation that is not a treaty party shall be considered to be first published in the United States or such treaty party, as the case may be.”; and (2) by adding at the end the following new subsection: “(d) EFFECT OF PHONOGRAMS TREATIES.—Notwithstanding the provisions of subsection (b), no works other than sound recordings shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Geneva Phonograms Convention or the WIPO Performances and Phonograms Treaty.”. (c) COPYRIGHT IN RESTORED WORKS.—Section 104A(h) of title 17, United States Code, is amended—

(1) in paragraph (1), by striking subparagraphs (A) and (B) and inserting the following:

“(A) a nation adhering to the Berne Convention;

“(B) a WTO member country;

“(C) a nation adhering to the WIPO Copyright Treaty;

“(D) a nation adhering to the WIPO Performances and Phonograms Treaty; or

“(E) subject to a Presidential proclamation under subsection (g).”;

(2) by amending paragraph (3) to read as follows:

“(3) The term ‘eligible country’ means a nation, other than the United States, that— “(A) becomes a WTO member country after the date of the enactment of the Uruguay Round Agreements Act;

“(B) on such date of enactment is, or after such date of enactment becomes, a nation adhering to the Berne Convention;

“(C) adheres to the WIPO Copyright Treaty;

“(D) adheres to the WIPO Performances and Phonograms Treaty; or

“(E) after such date of enactment becomes subject to a proclamation under subsection (g).”; (3) in paragraph (6)— (A) in subparagraph (C)(iii) by striking “and” after the semicolon; (B) at the end of subparagraph (D) by striking the period and inserting “; and”; and (C) by adding after subparagraph (D) the following: “(E) if the source country for the work is an eligible country solely by virtue of its adherence to the WIPO Performances and Phonograms Treaty, is a sound recording.”;

(4) in paragraph (8)(B)(i)—

(A) by inserting “of which” before “the majority”; and

(B) by striking “of eligible countries”; and (5) by striking paragraph (9).

(d) REGISTRATION AND INFRINGEMENT ACTIONS.—Section 411(a) of title 17, United States Code, is amended in the first sentence—

(1) by striking “actions for infringement of copyright in Berne Convention works whose country of origin is not the United States and”; and

(2) by inserting “United States” after “no action for infringement of the copyright in any”. (e) STATUTE OF LIMITATIONS.—Section 507(a) of title 17, United State Code, is amended by striking “No” and inserting “Except as expressly provided otherwise in this title, no”.

SEC. 103. COPYRIGHT PROTECTION SYSTEMS AND COPYRIGHT MANAGEMENT INFORMATION.

(a) IN GENERAL.—Title 17, United States Code, is amended by adding at the end the following new chapter:

"CHAPTER 12—COPYRIGHT PROTECTION AND
MANAGEMENT SYSTEMS

"Sec."1201. Circumvention of copyright protection systems.

"1202. Integrity of copyright management information.

"1203. Civil remedies.

"1204. Criminal offenses and penalties.

"1205. Savings clause.

"§ 1201. Circumvention of copyright protection systems

"(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL

MEASURES.—(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter."(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C). "(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding on the record for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine—

"(i) the availability for use of copyrighted works;

“(ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;

“(iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;

“(iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and

“(v) such other factors as the Librarian considers appropriate.

“(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period. “(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph. “(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that— “(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title; “(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

“(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title. “(3) As used in this subsection—

“(A) to ‘circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

“(B) a technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work. “(b) ADDITIONAL VIOLATIONS.—(1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that—

“(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

“(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

“(C) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof. “(2) As used in this subsection—

“(A) to ‘circumvent protection afforded by a technological measure’ means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

“(B) a technological measure ‘effectively protects a right of a copyright owner under this title’ if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

“(c) OTHER RIGHTS, ETC., NOT AFFECTED.—

(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

“(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

“(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

“(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

“(d) EXEMPTION FOR NONPROFIT LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS.—(1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under this title shall not be in violation of subsection (a)(1)(A). A copy of a work to which access has been gained under this paragraph—

“(A) may not be retained longer than necessary to make such good faith determination; and

“(B) may not be used for any other purpose.

“(2) The exemption made available under paragraph (1) shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.

“(3) A nonprofit library, archives, or educational institution that willfully for the purpose of commercial advantage or financial gain violates paragraph (1)— “(A) shall, for the first offense, be subject to the civil remedies under section 1203; and “(B)

shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203, forfeit the exemption provided under paragraph (1).

“(4) This subsection may not be used as a defense to a claim under subsection (a)(2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, component, or part thereof, which circumvents a technological measure.

“(5) In order for a library or archives to qualify for the exemption under this subsection, the collections of that library or archives shall be— “(A) open to the public; or “(B) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized

field.”(e) LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES.—This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term ‘information security’ means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

“(f) REVERSE ENGINEERING.—(1) Notwithstanding the provisions of subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

“(2) Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

“(3) The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case may be, provides such information or means solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.

“(4) For purposes of this subsection, the term ‘interoperability’ means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.

“(g) ENCRYPTION RESEARCH.— “(1) DEFINITIONS.—For purposes of this subsection— “(A) the term ‘encryption research’ means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products; and

“(B) the term ‘encryption technology’ means the scrambling and descrambling of information using mathematical formulas or algorithms. “(2) PERMISSIBLE ACTS OF ENCRYPTION RESEARCH.—Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure as applied to a copy, phonorecord, performance, or display of a published work in the course of an act of good faith encryption research if— “(A) the person lawfully

obtained the encrypted copy,phonorecord, performance, or display of the published work;

“(B) such act is necessary to conduct such encryption research;

“(C) the person made a good faith effort to obtain authorization before the circumvention; and

“(D) such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

“(3) FACTORS IN DETERMINING EXEMPTION.—In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include—

“(A) whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under this title or a violation of applicable law other than this section,including a violation of privacy or breach of security;

“(B) whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology; and

“(C) whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research, and the time when such notice is provided.

“(4) USE OF TECHNOLOGICAL MEANS FOR RESEARCH ACTIVITIES.—Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to—

“(A) develop and employ technological means to circumvent a technological measure for the sole purpose of that person performing the acts of good faith encryption research described in paragraph (2); and

“(B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).

“(5) REPORT TO CONGRESS.—Not later than 1 year after the date of the enactment of this chapter, the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly report to the Congress on the effect this subsection has had on—

“(A) encryption research and the development of encryption technology;

“(B) the adequacy and effectiveness of technological measures designed to protect copyrighted works; and

“(C) protection of copyright owners against the unauthorized access to their encrypted copyrighted works. The report shall include legislative recommendations, if any.

“(h) EXCEPTIONS REGARDING MINORS.—In applying subsection (a) to a component or part, the court may consider the necessity for its intended and actual incorporation in a technology, product, service, or device, which—

“(1) does not itself violate the provisions of this title; and

“(2) has the sole purpose to prevent the access of minors to material on the Internet.

“(i) PROTECTION OF PERSONALLY IDENTIFYING INFORMATION.—

(1) CIRCUMVENTION PERMITTED.—Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if—

“(A) the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected; Deadline.

“(B) in the normal course of its operation, the technological measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;

“(C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and

“(D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.

“(2) INAPPLICABILITY TO CERTAIN TECHNOLOGICAL MEASURES.—This subsection does not apply to a technological measure, or a work it protects, that does not collect or disseminate personally identifying information and that is disclosed to a user as not having or using such capability.

“(j) SECURITY TESTING.—“(1) DEFINITION.—For purposes of this subsection, the term ‘security testing’ means accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network.

“(2) PERMISSIBLE ACTS OF SECURITY TESTING.—Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to engage in an act of security testing, if such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

“(3) FACTORS IN DETERMINING EXEMPTION.—In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include—

“(A) whether the information derived from the security testing was used solely to promote the security of the owner or operator of such computer, computer system or computer network, or shared directly with the developer of such computer, computer system, or computer network ;and

“(B) whether the information derived from the security testing was used or maintained in a manner that does not facilitate infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security.

“(4) USE OF TECHNOLOGICAL MEANS FOR SECURITY TESTING.—Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to develop,produce, distribute or employ technological means for the sole purpose of performing the acts of security testing described in subsection (2), provided such technological means does not otherwise violate section (a)(2).

“(k) CERTAIN ANALOG DEVICES AND CERTAIN TECHNOLOGICAL MEASURES.— “(1) CERTAIN ANALOG DEVICES.— “(A) Effective 18 months after the date of the enactment of this chapter, no person shall manufacture, import,offer to the public, provide or otherwise traffic in any—

“(i) VHS format analog video cassette recorder unless such recorder conforms to the automatic gain control copy control technology;

“(ii) 8mm format analog video cassette camcorder unless such camcorder conforms to the automatic gain control technology;

“(iii) Beta format analog video cassette recorder,unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 1,000 Beta format analog video cassette recorders sold in the United States in any one calendar year after the date of the enactment of this chapter;

“(iv) 8mm format analog video cassette recorder that is not an analog video cassette camcorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 20,000 such recorders sold in the United States in any one calendar year after the date of the enactment of this chapter; or

“(v) analog video cassette recorder that records using an NTSC format video input and that is not otherwise covered under clauses (i) through (iv), unless such device conforms to the automatic gain control copy control technology.

“(B) Effective on the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in—

“(i) any VHS format analog video cassette recorder or any 8mm format analog video cassette recorder if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the automatic gain control copy control technology no longer conforms to such technology; or

“(ii) any VHS format analog video cassette recorder, or any 8mm format analog video cassette recorder that is not an 8mm analog video cassette camcorder, if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the four-line colorstripe copy control technology no longer conforms to such technology. Manufacturers that have not previously manufactured or sold a VHS format analog video cassette recorder, or an 8mm format analog cassette recorder, shall be required to conform to the four-line colorstripe copy control technology in the initial model of any such recorder manufactured after the date of the enactment of this chapter, and thereafter to continue conforming to the four-line colorstripe copy control technology. For purposes of this subparagraph, an analog video cassette recorder ‘conforms to’ the four-line colorstripe copy control technology if it records a signal that, when played back by the playback function of that recorder in the normal viewing mode, exhibits, on

a reference display device, a display containing distracting visible lines through portions of the viewable picture.

“(2) CERTAIN ENCODING RESTRICTIONS.—No person shall apply the automatic gain control copy control technology or colorstripe copy control technology to prevent or limit consumer copying except such copying—

“(A) of a single transmission, or specified group of transmissions, of live events or of audiovisual works for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions;

“(B) from a copy of a transmission of a live event or an audiovisual work if such transmission is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service;

“(C) from a physical medium containing one or more prerecorded audiovisual works; or “(D) from a copy of a transmission described in subparagraph (A) or from a copy made from a physical medium described in subparagraph (C). In the event that a transmission meets both the conditions set forth in subparagraph (A) and those set forth in subparagraph (B), the transmission shall be treated as a transmission described in subparagraph (A).

“(3) INAPPLICABILITY.—This subsection shall not—“(A) require any analog video cassette camcorder to conform to the automatic gain control copy control technology with respect to any video signal received through a camera lens;

“(B) apply to the manufacture, importation, offer for sale, provision of, or other trafficking in, any professional analog video cassette recorder; or

“(C) apply to the offer for sale or provision of, or other trafficking in, any previously owned analog video cassette recorder, if such recorder was legally

manufactured and sold when new and not subsequently modified in violation of paragraph (1)(B).

“(4) DEFINITIONS.—For purposes of this subsection:

“(A) An ‘analog video cassette recorder’ means a device that records, or a device that includes a function that records, on electromagnetic tape in an analog format the electronic impulses produced by the video and audio portions of a television program, motion picture, or other form of audiovisual work.

“(B) An ‘analog video cassette camcorder’ means an analog video cassette recorder that contains a recording function that operates through a camera lens and through a video input that may be connected with a television or other video playback device.

“(C) An analog video cassette recorder ‘conforms’ to the automatic gain control copy control technology if it—

“(i) detects one or more of the elements of such technology and does not record the motion picture or transmission protected by such technology; or

“(ii) records a signal that, when played back, exhibits a meaningfully distorted or degraded display.

“(D) The term ‘professional analog video cassette recorder’ means an analog video cassette recorder that is designed, manufactured, marketed, and intended for use by a person who regularly employs such a device for a lawful business or industrial use, including making, performing, displaying, distributing, or transmitting copies of motion pictures on a commercial scale.

“(E) The terms ‘VHS format’, ‘8mm format’, ‘Beta format’, ‘automatic gain control copy control technology’, ‘colorstripe copy control technology’, ‘four-line version of the colorstripe copy control technology’, and ‘NTSC’ have the meanings that are commonly understood in the consumer electronics and motion picture industries as of the date of the enactment of this chapter.

“(5) VIOLATIONS.—Any violation of paragraph (1) of this subsection shall be treated as a violation of subsection (b)(1) of this section. Any violation of paragraph (2)

of this subsection shall be deemed an 'act of circumvention' for the purposes of section 1203(c)(3)(A) of this chapter.

"§ 1202. Integrity of copyright management information

"(a) FALSE COPYRIGHT MANAGEMENT INFORMATION.—No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement—

"(1) provide copyright management information that is false, or

"(2) distribute or import for distribution copyright management information that is false.

"(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION.—No person shall, without the authority of the copyright owner or the law

"(1) intentionally remove or alter any copyright management information,

"(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

"(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

"(c) DEFINITION.—As used in this section, the term 'copyright management information' means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

"(1) The title and other information identifying the work, including the information set forth on a notice of copyright.

"(2) The name of, and other identifying information about, the author of a work.

“(3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.

“(4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

“(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

“(6) Terms and conditions for use of the work.

“(7) Identifying numbers or symbols referring to such information or links to such information.

“(8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

“(d) LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES.—This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term ‘information security’ means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

“(e) LIMITATIONS ON LIABILITY.—

“(1) ANALOG TRANSMISSIONS.—In the case of an analog transmission, a person who is making transmissions in its capacity as a broadcast station, or as a cable system, or someone who provides programming to such station or system, shall not be liable for a violation of subsection (b) if—

“(A) avoiding the activity that constitutes such violation is not technically feasible or would create an undue financial hardship on such person; and

“(B) such person did not intend, by engaging in such activity, to induce, enable, facilitate, or conceal infringement of a right under this title.

“(2) DIGITAL TRANSMISSIONS.—“(A) If a digital transmission standard for the placement of copyright management information for a category of works is set in a voluntary, consensus standard-setting process involving a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to the particular copyright management information addressed by such standard if—

“(i) the placement of such information by someone other than such person is not in accordance with such standard; and

“(ii) the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title.

“(B) Until a digital transmission standard has been set pursuant to subparagraph (A) with respect to the placement of copyright management information for a category

or works, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to such copyright management information, if the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title, and if—

“(i) the transmission of such information by such person would result in a perceptible visual or aural degradation of the digital signal; or

“(ii) the transmission of such information by such person would conflict with—

“(I) an applicable government regulation relating to transmission of information in a digital signal;

“(II) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted by a voluntary consensus standards body prior to the effective date of this chapter; or

“(III) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted in a voluntary, consensus standards-setting process open to participation by a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems.

“(3) DEFINITIONS.—As used in this subsection— “(A) the term ‘broadcast station’ has the meaning given that term in section 3 of the Communications Act of 1934 (47 U.S.C. 153); and “(B) the term ‘cable system’ has the meaning given that term in section 602 of the Communications Act of 1934 (47 U.S.C. 522).

“§ 1203. Civil remedies

“(a) CIVIL ACTIONS.—Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

“(b) POWERS OF THE COURT.—In an action brought under subsection (a), the court—

“(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;

“(2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;

“(3) may award damages under subsection (c);

“(4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;

“(5) in its discretion may award reasonable attorney’s fees to the prevailing party; and

“(6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

“(c) AWARD OF DAMAGES.—

“(1) IN GENERAL.—Except as otherwise provided in this title, a person committing a violation of section 1201 or 1202 is liable for either— “(A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or “(B) statutory damages, as provided in paragraph (3).

“(2) ACTUAL DAMAGES.—The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

“(3) STATUTORY DAMAGES.—(A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than \$200 or more than \$2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.

“(B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.

“(4) REPEATED VIOLATIONS.—In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within 3 years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

“(5) INNOCENT VIOLATIONS.— “(A) IN GENERAL.—The court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and 112 STAT. the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

“(B) NONPROFIT LIBRARY, ARCHIVES, OR EDUCATIONAL INSTITUTIONS.—In the case of a nonprofit library, archives, or educational institution, the court shall remit damages in any case in which the library, archives, or educational institution sustains the burden of proving, and the court finds, that the library, archives, or educational institution was not aware and had no reason to believe that its acts constituted a violation.

“§ 1204. Criminal offenses and penalties

“(a) IN GENERAL.—Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain—“(1) shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and “(2) shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense. “(b) LIMITATION FOR NONPROFIT LIBRARY, ARCHIVES, OR EDUCATIONAL INSTITUTION.—Subsection (a) shall not apply to a nonprofit library, archives, or educational institution.

“(c) STATUTE OF LIMITATIONS.—No criminal proceeding shall be brought under this section unless such proceeding is commenced within 5 years after the cause of action arose.

“§ 1205. Savings clause

“Nothing in this chapter abrogates, diminishes, or weakens the provisions of, nor provides any defense or element of mitigation in a criminal prosecution or civil action under, any Federal or State law that prevents the violation of the privacy of an individual in connection with the individual's use of the Internet.”.

(b) CONFORMING AMENDMENT.—The table of chapters for title 17, United States Code, is amended by adding after the item relating to chapter 11 the following:

SEC. 104. EVALUATION OF IMPACT OF COPYRIGHT LAW AND AMENDMENTS ON ELECTRONIC COMMERCE AND TECHNOLOGICAL DEVELOPMENT.

(a) EVALUATION BY THE REGISTER OF COPYRIGHTS AND THE ASSISTANT SECRETARY FOR COMMUNICATIONS AND INFORMATION.— The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly evaluate—

(1) the effects of the amendments made by this title and the development of electronic commerce and associated technology on the operation of sections 109 and 117 of title 17, United States Code; and

(2) the relationship between existing and emergent technology and the operation of sections 109 and 117 of title 17, United States Code.

(b) REPORT TO CONGRESS.—The Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall, not later than 24 months after the date of the enactment of this Act, submit to the Congress a joint report on the evaluation conducted under subsection (a), including any legislative recommendations the Register and the Assistant Secretary may have.

SEC. 105. EFFECTIVE DATE.

(a) IN GENERAL.—Except as otherwise provided in this title, this title and the amendments made by this title shall take effect on the date of the enactment of this Act.

(b) AMENDMENTS RELATING TO CERTAIN INTERNATIONAL AGREEMENTS.—

(1) The following shall take effect upon the entry into force of the WIPO Copyright Treaty with respect to the United States:

(A) Paragraph (5) of the definition of “international agreement” contained in section 101 of title 17, United States Code, as amended by section 102(a)(4) of this Act.

(B) The amendment made by section 102(a)(6) of this Act (C) Subparagraph (C) of section 104A(h)(1) of title 17, United States Code, as amended by section 102(c)(1) of this Act.

(D) Subparagraph (C) of section 104A(h)(3) of title 17, United States Code, as amended by section 102(c)(2) of this Act.(2) The following shall take effect upon the entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States:

(A) Paragraph (6) of the definition of “international agreement” contained in section 101 of title 17, United States Code, as amended by section 102(a)(4) of this Act.

(B) The amendment made by section 102(a)(7) of this Act.

(C) The amendment made by section 102(b)(2) of this Act.

(D) Subparagraph (D) of section 104A(h)(1) of title 17, United States Code, as amended by section 102(c)(1) of this Act.

(E) Subparagraph (D) of section 104A(h)(3) of title 17, United States Code, as amended by section 102(c)(2) of this Act.

(F) The amendments made by section 102(c)(3) of this Act.

TITLE II—ONLINE COPYRIGHT INFRINGEMENT LIABILITY LIMITATION

SEC. 201. SHORT TITLE.

This title may be cited as the “Online Copyright Infringement Liability Limitation Act”.

SEC. 202. LIMITATIONS ON LIABILITY FOR COPYRIGHT INFRINGEMENT.

(a) IN GENERAL.—Chapter 5 of title 17, United States Code, is amended by adding after section 511 the following new section:

“§ 512. Limitations on liability relating to material online

“(a) TRANSITORY DIGITAL NETWORK COMMUNICATIONS.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief,for infringement of copyright by reason of the provider’s transmitting,routing, or providing connections for, material through a system or network controlled or operated by or for the service provider,or by reason of

the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if—

“(1) the transmission of the material was initiated by or at the direction of a person other than the service provider;

“(2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider;

“(3) the service provider does not select the recipients of the material except as an automatic response to the request of another person;

“(4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and

“(5) the material is transmitted through the system or network without modification of its content. “(b) SYSTEM CACHING.—

“(1) LIMITATION ON LIABILITY.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider in a case in which—

“(A) the material is made available online by a person other than the service provider;

“(B) the material is transmitted from the person described in subparagraph (A) through the system or network to a person other than the person described in subparagraph (A) at the direction of that other person; and

“(C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who,

after the material is transmitted as described in subparagraph (B), request access to the material from the person described in subparagraph (A), if the conditions set forth in paragraph (2) are met.

(2) CONDITIONS.—The conditions referred to in paragraph (1) are that—

“(A) the material described in paragraph (1) is transmitted to the subsequent users described in paragraph (1)(C) without modification to its content from the manner in which the material was transmitted from the person described in paragraph (1)(A);

“(B) the service provider described in paragraph (1) complies with rules concerning the refreshing, reloading, or other updating of the material when specified by the person making the material available online in accordance with a generally accepted industry standard data communications protocol for the system or network through which that person makes the material available, except that this subparagraph applies only if those rules are not used by the person described in paragraph (1)(A) to prevent or unreasonably impair the intermediate storage to which this subsection applies;

“(C) the service provider does not interfere with the ability of technology associated with the material to return to the person described in paragraph (1)(A) the information that would have been available to that person if the material had been obtained by the subsequent users described in paragraph (1)(C) directly from that person, except that this subparagraph applies only if that technology—

“(i) does not significantly interfere with the performance of the provider’s system or network or with the intermediate storage of the material;

“(ii) is consistent with generally accepted industry standard communications protocols; and

“(iii) does not extract information from the provider’s system or network other than the information that would have been available to the person described in paragraph (1)(A) if the subsequent users had gained access to the material directly from that person;

“(D) if the person described in paragraph (1)(A) has in effect a condition that a person must meet prior to having access to the material, such as a condition based on payment of a fee or provision of a password or other information, the service provider permits access to the stored material in significant part only to users of its system or network that have met those conditions and only in accordance with those conditions; and

“(E) if the person described in paragraph (1)(A) makes that material available online without the authorization of the copyright owner of the material, the service provider responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in subsection (c)(3), except that this subparagraph applies only if—

“(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and

“(ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled.

“(c) INFORMATION RESIDING ON SYSTEMS OR NETWORKS AT DIRECTION OF USERS.—

“(1) IN GENERAL.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

“(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

“(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

“(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

“(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

“(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

“(2) DESIGNATED AGENT.—The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

“(A) the name, address, phone number, and electronic mail address of the agent.

“(B) other contact information which the Register of Copyrights may deem appropriate. The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

“(3) ELEMENTS OF NOTIFICATION.—

“(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

“(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

“(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

“(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

“(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

Records.

“(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

“(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

“(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

“(ii) In a case in which the notification that is provided to the service provider’s designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies

only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

“(d) INFORMATION LOCATION TOOLS.—A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—

“(1)(A) does not have actual knowledge that the material or activity is infringing;

“(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

“(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

“(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

“(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

“(e) LIMITATION ON LIABILITY OF NONPROFIT EDUCATIONAL INSTITUTIONS.—

(1) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member’s or graduate student’s knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if—

“(A) such faculty member’s or graduate student’s infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

“(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

“(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.

“(2) INJUNCTIONS.—For the purposes of this subsection, the limitations on injunctive relief contained in subsections (j)(2) and (j)(3), but not those in (j)(1), shall apply.

“(f) MISREPRESENTATIONS.—Any person who knowingly materially misrepresents under this section—

“(1) that material or activity is infringing, or

“(2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for any damages, including costs and attorneys’ fees, incurred by the alleged infringer, by any copyright owner or copyright owner’s authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

“(g) REPLACEMENT OF REMOVED OR DISABLED MATERIAL AND LIMITATION ON OTHER LIABILITY.—

“(1) NO LIABILITY FOR TAKING DOWN GENERALLY.—Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider’s good faith disabling of access to, or removal of, material or activity

claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

“(2) EXCEPTION.—Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider—

“(A) takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material; Applicability.

“(B) upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and

“(C) replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider’s system or network.

“(3) CONTENTS OF COUNTER NOTIFICATION.—To be effective under this subsection, a counter notification must be a written communication provided to the service provider’s designated agent that includes substantially the following:

“(A) A physical or electronic signature of the subscriber.

“(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

“(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

“(D) The subscriber’s name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber’s address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

“(4) LIMITATION ON OTHER LIABILITY.—A service provider’s compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

“(h) SUBPOENA TO IDENTIFY INFRINGER.—

“(1) REQUEST.—A copyright owner or a person authorized to act on the owner’s behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer in accordance with this subsection. “(2) CONTENTS OF REQUEST.—The request may be made by filing with the clerk—

“(A) a copy of a notification described in subsection (c)(3)(A);

“(B) a proposed subpoena; and

“(C) a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.

“(3) CONTENTS OF SUBPOENA.—The subpoena shall authorize and order the service provider receiving the notification and the subpoena to expeditiously disclose to the copyright owner or person authorized by the copyright owner information sufficient to identify the alleged infringer of the material described in the notification to the extent such information is available to the service provider.

“(4) BASIS FOR GRANTING SUBPOENA.—If the notification filed satisfies the provisions of subsection (c)(3)(A), the proposed subpoena is in proper form, and the accompanying declaration is properly executed, the clerk shall expeditiously issue and sign the proposed subpoena and return it to the requester for delivery to the service provider.

“(5) ACTIONS OF SERVICE PROVIDER RECEIVING SUBPOENA.— Upon receipt of the issued subpoena, either accompanying or subsequent to the receipt of a notification described in subsection (c)(3)(A), the service provider shall expeditiously disclose to the copyright owner or person authorized by the copyright owner the information required by the subpoena, notwithstanding any other provision of law and regardless of whether the service provider responds to the notification.

“(6) RULES APPLICABLE TO SUBPOENA.—Unless otherwise provided by this section or by applicable rules of the court, the procedure for issuance and delivery of the subpoena, and the remedies for noncompliance with the subpoena, shall be governed to the greatest extent practicable by those provisions of the Federal Rules of Civil Procedure governing the issuance, service, and enforcement of a subpoena duces tecum.

“(i) CONDITIONS FOR ELIGIBILITY.—

“(1) ACCOMMODATION OF TECHNOLOGY.—The limitations on liability established by this section shall apply to a service provider only if the service provider—

“(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and

“(B) accommodates and does not interfere with standard technical measures.

“(2) DEFINITION.—As used in this subsection, the term ‘standard technical measures’ means technical measures that are used by copyright owners to identify or protect copyrighted works and—

“(A) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process;

“(B) are available to any person on reasonable and nondiscriminatory terms; and

“(C) do not impose substantial costs on service providers or substantial burdens on their systems or networks.

“(j) INJUNCTIONS.—The following rules shall apply in the case of any application for an injunction under section 502 against a service provider that is not subject to monetary remedies under this section:

“(1) SCOPE OF RELIEF.—(A) With respect to conduct other than that which qualifies for the limitation on remedies set forth in subsection (a), the court may grant injunctive relief with respect to a service provider only in one or more of the following forms:

“(i) An order restraining the service provider from providing access to infringing material or activity residing at a particular online site on the provider’s system or network.

“(ii) An order restraining the service provider from providing access to a subscriber or account holder of the service provider’s system or network who is engaging in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

“(iii) Such other injunctive relief as the court may consider necessary to prevent or restrain infringement of copyrighted material specified in the order of the court at a particular online location, if such relief is the least burdensome to the service provider among the forms of relief comparably effective for that purpose.

“(B) If the service provider qualifies for the limitation on remedies described in subsection (a), the court may only grant injunctive relief in one or both of the following forms:

“(i) An order restraining the service provider from providing access to a subscriber or account holder of the service provider’s system or network who is using

the provider's service to engage in infringing activity and is identified in the order, by terminating the accounts of the subscriber or account holder that are specified in the order.

“(ii) An order restraining the service provider from providing access, by taking reasonable steps specified in the order to block access, to a specific, identified, online location outside the United States.

“(2) CONSIDERATIONS.—The court, in considering the relevant criteria for injunctive relief under applicable law, shall consider—

“(A) whether such an injunction, either alone or in combination with other such injunctions issued against the same service provider under this subsection, would significantly burden either the provider or the operation of the provider's system or network;

“(B) the magnitude of the harm likely to be suffered by the copyright owner in the digital network environment if steps are not taken to prevent or restrain the infringement;

“(C) whether implementation of such an injunction would be technically feasible and effective, and would not interfere with access to noninfringing material at other online locations; and

“(D) whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available.

“(3) NOTICE AND EX PARTE ORDERS.—Injunctive relief under this subsection shall be available only after notice to the service provider and an opportunity for the service provider to appear are provided, except for orders ensuring the preservation of evidence or other orders having no material adverse effect on the operation of the service provider's communications network.

“(k) DEFINITIONS.—

“(1) SERVICE PROVIDER.—(A) As used in subsection (a), the term ‘service provider’ means an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of

material of the user's choosing, without modification to the content of the material as sent or received.

“(B) As used in this section, other than subsection (a), the term ‘service provider’ means a provider of online services or network access, or the operator of facilities therefor, and includes an entity described in subparagraph (A). “(2) MONETARY RELIEF.—As used in this section, the term ‘monetary relief’ means damages, costs, attorneys’ fees, and any other form of monetary payment. “(I) OTHER DEFENSES NOT AFFECTED.—The failure of a service provider’s conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider’s conduct is not infringing under this title or any other defense.

“(m) PROTECTION OF PRIVACY.—Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on—

“(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

“(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

“(n) CONSTRUCTION.—Subsections (a), (b), (c), and (d) describe separate and distinct functions for purposes of applying this section. Whether a service provider qualifies for the limitation on liability in any one of those subsections shall be based solely on the criteria in that subsection, and shall not affect a determination of whether that service provider qualifies for the limitations on liability under any other such subsection.”. (b) CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 17, United States Code, is amended by adding at the end the following:

“512. Limitations on liability relating to material online.”.

SEC. 203. EFFECTIVE DATE.

This title and the amendments made by this title shall take effect on the date of the enactment of this Act.

TITLE III—COMPUTER MAINTENANCE OR REPAIR COPYRIGHT EXEMPTION

SEC. 301. SHORT TITLE.

This title may be cited as the “Computer Maintenance Competition Assurance Act”.

SEC. 302. LIMITATIONS ON EXCLUSIVE RIGHTS; COMPUTER PROGRAMS.

Section 117 of title 17, United States Code, is amended—

(1) by striking “Notwithstanding” and inserting the following:

“(a) MAKING OF ADDITIONAL COPY OR ADAPTATION BY OWNER OF COPY.—Notwithstanding”;

(2) by striking “Any exact” and inserting the following: “(b) LEASE, SALE, OR OTHER TRANSFER OF ADDITIONAL COPY OR ADAPTATION.—Any exact”; and

(3) by adding at the end the following: “(c) MACHINE MAINTENANCE OR REPAIR.—Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if—

“(1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and

“(2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine. “(d) DEFINITIONS.—For purposes of this section— “(1) the ‘maintenance’ of a machine is the servicing of the machine in order to make it work in accordance with its original specifications and any changes to those specifications authorized for that machine; and

“(2) the ‘repair’ of a machine is the restoring of the machine to the state of working in accordance with its original specifications and any changes to those specifications authorized for that machine.”

TITLE IV—MISCELLANEOUS PROVISIONS

SEC. 401. PROVISIONS RELATING TO THE COMMISSIONER OF PATENTS AND TRADEMARKS AND THE REGISTER OF COPYRIGHTS

(a) COMPENSATION.—(1) Section 3(d) of title 35, United States Code, is amended by striking “prescribed by law for Assistant Secretaries of Commerce” and inserting “in effect for level III of the Executive Schedule under section 5314 of title 5, United States Code”. (2) Section 701(e) of title 17, United States Code, is amended—

(A) by striking “IV” and inserting “III”; and

(B) by striking “5315” and inserting “5314”.

(3) Section 5314 of title 5, United States Code, is amended by adding at the end the following: “Assistant Secretary of Commerce and Commissioner of Patents and Trademarks. “Register of Copyrights.”. (b) CLARIFICATION OF AUTHORITY OF THE COPYRIGHT OFFICE.— Section 701 of title 17, United States Code, is amended—

(1) by redesignating subsections (b) through (e) as subsections (c) through (f), respectively; and

(2) by inserting after subsection (a) the following: “(b) In addition to the functions and duties set out elsewhere in this chapter, the Register of Copyrights shall perform the following functions:

“(1) Advise Congress on national and international issues relating to copyright, other matters arising under this title, and related matters.

“(2) Provide information and assistance to Federal departments and agencies and the Judiciary on national and international issues relating to copyright, other matters arising under this title, and related matters.

“(3) Participate in meetings of international intergovernmental organizations and meetings with foreign government officials relating to copyright, other matters arising under this title, and related matters, including as a member of United States delegations as authorized by the appropriate Executive branch authority.

“(4) Conduct studies and programs regarding copyright, other matters arising under this title, and related matters, the administration of the Copyright Office, or any

function vested in the Copyright Office by law, including educational programs conducted cooperatively with foreign intellectual property offices and international intergovernmental organizations.

“(5) Perform such other functions as Congress may direct, or as may be appropriate in furtherance of the functions and duties specifically set forth in this title.”.

SEC. 402. EPHEMERAL RECORDINGS.

Section 112(a) of title 17, United States Code, is amended—

(1) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively; (2) by inserting “(1)” after “(a)”; (3) by inserting after “under a license” the following: “, including a statutory license under section 114(f),”; (4) by inserting after “114(a),” the following: “or for a transmitting organization that is a broadcast radio or television station licensed as such by the Federal Communications Commission and that makes a broadcast transmission of a performance of a sound recording in a digital format on a nonsubscription basis,”; and (5) by adding at the end the following: “(2) In a case in which a transmitting organization entitled to make a copy or phonorecord under paragraph (1) in connection with the transmission to the public of a performance or display of a work is prevented from making such copy or phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the work, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such copy or phonorecord as permitted under that paragraph, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization’s reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such copies or phonorecords as permitted under paragraph (1) of this subsection.”.

SEC. 403. LIMITATIONS ON EXCLUSIVE RIGHTS; DISTANCE EDUCATION.

(a) RECOMMENDATIONS BY REGISTER OF COPYRIGHTS.—Not later than 6 months after the date of the enactment of this Act, the Register of Copyrights, after consultation with representatives of copyright owners, nonprofit educational institutions, and nonprofit libraries and archives, shall submit to the Congress recommendations on how to promote distance education through digital technologies, including interactive digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works. Such recommendations shall include any legislation the Register of Copyrights considers appropriate to achieve the objective described in the preceding sentence.

(b) FACTORS.—In formulating recommendations under subsection (a), the Register of Copyrights shall consider—

(1) the need for an exemption from exclusive rights of copyright owners for distance education through digital networks;

(2) the categories of works to be included under any distance education exemption;

(3) the extent of appropriate quantitative limitations on the portions of works that may be used under any distance education exemption;

(4) the parties who should be entitled to the benefits of any distance education exemption;

(5) the parties who should be designated as eligible recipients of distance education materials under any distance education exemption;

(6) whether and what types of technological measures can or should be employed to safeguard against unauthorized access to, and use or retention of, copyrighted materials as a condition of eligibility for any distance education exemption, including, in light of developing technological capabilities, the exemption set out in section 110(2) of title 17, United States Code;

(7) the extent to which the availability of licenses for the use of copyrighted works in distance education through interactive digital networks should be considered in assessing eligibility for any distance education exemption; and

(8) such other issues relating to distance education through interactive digital networks that the Register considers appropriate.

SEC. 404. EXEMPTION FOR LIBRARIES AND ARCHIVES.

Section 108 of title 17, United States Code, is amended—

(1) in subsection (a)—

(A) by striking “Notwithstanding” and inserting

“Except as otherwise provided in this title and notwithstanding”;

(B) by inserting after “no more than one copy or phonorecord of a work” the following: “, except as provided in subsections (b) and (c)”;

(C) in paragraph (3) by inserting after “copyright” the following: “that appears on the copy or phonorecord that is reproduced under the provisions of this section, or Deadline. includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section”;

(2) in subsection (b)— (A) by striking “a copy or phonorecord” and inserting “three copies or phonorecords”;

(B) by striking “in facsimile form”; and

(C) by striking “if the copy or phonorecord reproduced is currently in the collections of the library or archives.” and inserting “if—

“(1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and

“(2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.”; and

(3) in subsection (c)—

(A) by striking “a copy or phonorecord” and inserting “three copies or phonorecords”;

(B) by striking “in facsimile form”;

(C) by inserting “or if the existing format in which the work is stored has become obsolete,” after “stolen,”;

(D) by striking “if the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.” and inserting “if—

“(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

“(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.”; and

(E) by adding at the end the following: “For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”.

SEC. 405. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS; EPHEMERAL RECORDINGS.

(a) SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.—Section 114 of title 17, United States Code, is amended as follows:

(1) Subsection (d) is amended— (A) in paragraph (1) by striking subparagraph (A) and inserting the following: “(A) a nonsubscription broadcast transmission;” and

(B) by amending paragraph (2) to read as follows: “(2) STATUTORY LICENSING OF CERTAIN TRANSMISSIONS.— The performance of a sound recording publicly by means of a subscription digital audio transmission not exempt under paragraph (1), an eligible nonsubscription transmission, or a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service shall be subject to statutory licensing, in accordance with subsection (f) if—

“(A)(i) the transmission is not part of an interactive service; “(ii) except in the case of a transmission to a business establishment, the transmitting entity does not automatically and intentionally cause any device receiving the transmission to switch from one program channel to another; and “(iii) except as provided in section 1002(e), the transmission of the sound recording is accompanied, if technically feasible, by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer;

“(B) in the case of a subscription transmission not exempt under paragraph (1) that is made by a preexisting subscription service in the same transmission medium used by such service on July 31, 1998, or in the case of a transmission not exempt under paragraph (1) that is made by a preexisting satellite digital audio radio service—

“(i) the transmission does not exceed the sound recording performance complement; and

“(ii) the transmitting entity does not cause to be published by means of an advance program schedule or prior announcement the titles of the specific sound recordings or phonorecords embodying such sound recordings to be transmitted; and

“(C) in the case of an eligible nonsubscription transmission or a subscription transmission not exempt under paragraph (1) that is made by a new subscription service or by a preexisting subscription service other than in the same transmission medium used by such service on July 31, 1998—

“(i) the transmission does not exceed the sound recording performance complement, except that this requirement shall not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by a transmitting entity that does not have the right or ability to control the programming of the broadcast station making the broadcast transmission, unless—

“(l) the broadcast station makes broadcast transmissions—

“(aa) in digital format that regularly exceed the sound recording performance complement; or “(bb) in analog format, a substantial portion of which, on a weekly basis, exceed the sound recording performance complement; and

“(II) the sound recording copyright owner or its representative has notified the transmitting entity in writing that broadcast transmissions of the copyright owner’s sound recordings exceed the sound recording performance complement as provided in this clause;

“(ii) the transmitting entity does not cause to be published, or induce or facilitate the publication, by means of an advance program schedule or prior announcement, the titles of the specific sound recordings to be transmitted, the phonorecords embodying such sound recordings, or, other than for illustrative purposes, the names of the featured recording artists, except that this clause does not disqualify a transmitting entity that makes a prior announcement that a particular artist will be featured within an unspecified future time period, and in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, the requirement of this clause shall not apply to a prior oral announcement by the broadcast station, or to an advance program schedule published, induced, or facilitated by the broadcast station, if the transmitting entity does not have actual knowledge and has not received written notice from the copyright owner or its representative that the broadcast station publishes or induces or facilitates the publication of such advance program schedule, or if such advance program schedule is a schedule of classical music programming published by the broadcast station in the same manner as published by that broadcast station on or before September 30, 1998;

“(iii) the transmission—

“(I) is not part of an archived program of less than 5 hours duration;

“(II) is not part of an archived program of 5 hours or greater in duration that is made available for a period exceeding 2 weeks;

“(III) is not part of a continuous program which is of less than 3 hours duration; or “(IV) is not part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at—

“(aa) more than 3 times in any 2-week period that have been publicly announced in advance, in the case of a program of less than 1 hour in duration, or

“(bb) more than 4 times in any 2-week period that have been publicly announced in advance, in the case of a program of 1 hour or more in duration, except that the requirement of this subclause shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

“(iv) the transmitting entity does not knowingly perform the sound recording, as part of a service that offers transmissions of visual images contemporaneously with transmissions of sound recordings, in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity, or as to the origin, sponsorship, or approval by the copyright owner or featured recording artist of the activities of the transmitting entity other than the performance of the sound recording itself;

“(v) the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity’s transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in

operation, or that is licensed by the Federal Communications Commission, on or before July 31, 1998;

“(vi) the transmitting entity takes no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient, and if the technology used by the transmitting entity enables the transmitting entity to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format, the transmitting entity sets such technology to limit such making of phonorecords to the extent permitted by such technology;

“(vii) phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the transmission from a phonorecord lawfully made under the authority of the copyright owner, except that the requirement of this clause shall not apply to a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, unless the transmitting entity is given notice in writing by the copyright owner of the sound recording that the broadcast station makes broadcast transmissions that regularly violate such requirement;

“(viii) the transmitting entity accommodates and does not interfere with the transmission of technical measures that are widely used by sound recording copyright owners to identify or protect copyrighted works, and that are technically feasible of being transmitted by the transmitting entity without imposing substantial costs on the transmitting entity or resulting in perceptible aural or visual degradation of the digital signal, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed under the authority of the Federal Communications Commission, on or before July 31, 1998, to the extent that such service has designed, developed, or made commitments to procure equipment or technology that is not compatible with such technical measures before such technical measures are widely adopted by sound recording copyright owners; and

“(ix) the transmitting entity identifies in textual data the sound recording during, but not before, the time it is performed, including the title of the sound recording, the title of the phonorecord embodying such sound recording, if any, and the featured recording artist, in a manner to permit it to be displayed to the transmission recipient by the device or technology intended for receiving the service provided by the transmitting entity, except that the obligation in this clause shall not take effect until 1 year after the date of the enactment of the Digital Millennium Copyright Act and shall not apply in the case of a retransmission of a broadcast transmission by a transmitting entity that does not have the right or ability to control the programming of the broadcast transmission, or in the

case in which devices or technology intended for receiving the service provided by the transmitting entity that have the capability to display such textual data are not common in the marketplace.”. (2) Subsection (f) is amended—

(A) in the subsection heading by striking “NONEXEMPT SUBSCRIPTION” and inserting “CERTAIN NONEXEMPT”;

(B) in paragraph (1)— (i) in the first sentence—

(I) by striking “(1) No” and inserting “(1)(A) No”;

(II) by striking “the activities” and inserting “subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services”; and

(III) by striking “2000” and inserting “2001”; And (ii) by amending the third sentence to read as follows: “Any copyright owners of sound recordings, preexisting subscription services, or preexisting satellite digital audio radio services may submit to the Librarian of Congress licenses covering such subscription transmissions with respect to such sound recordings.”;and

(C) by striking paragraphs (2), (3), (4), and (5) and inserting the following:

“(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 Federal Register, publication. months after publication of the notice specified in subparagraph (A), and upon the filing of a petition

in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph. In establishing rates and terms for preexisting subscription services and preexisting satellite digital audio radio services, in addition to the objectives set forth in section 801(b)(1), the copyright arbitration royalty panel may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements negotiated as provided in subparagraph (A). "(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe— "(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings, any preexisting subscription services, or any preexisting satellite digital audio radio services indicating that a new type of subscription digital audio transmission service on which sound recordings are performed is or is about to become operational; and

"(II) in the first week of January 2001, and at 5- year intervals thereafter.

"(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing—

"(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I) of this subparagraph; or "(II) on July 1, 2001, and at 5-year intervals thereafter.

"(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802. "(2)(A) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty

payments for public performances of sound recordings by means of eligible nonsubscription transmissions and transmissions by new subscription services specified by subsection (d)(2) during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services and new subscription services then in operation and shall include a minimum fee for each such type of service. Any copyright owners of sound recordings or any entities performing sound recordings affected by this paragraph may submit to the Librarian of Congress licenses covering such eligible nonsubscription transmissions and new subscription services with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

“(B) In the absence of license agreements negotiated under subparagraph (A), during the 60-day period commencing 6 months after publication of the notice specified in subparagraph (A), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates and terms shall distinguish among the different types of eligible nonsubscription transmission services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria including, but not limited to, the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing

buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including— “(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from its sound recordings; and

“(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A). “(C)(i) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in subparagraph (A) shall be repeated in accordance with regulations that the Librarian of Congress shall prescribe—

“(I) no later than 30 days after a petition is filed by any copyright owners of sound recordings or any eligible nonsubscription service or new subscription service indicating that a new type of eligible nonsubscription service or new subscription service on which sound recordings are performed is or is about to become operational; and

“(II) in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined

in accordance with subparagraph (A). “(ii) The procedures specified in subparagraph (B) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1) during a 60-day period commencing— “(I) 6 months after publication of a notice of the initiation of voluntary negotiation proceedings under subparagraph (A) pursuant to a petition under clause (i)(I); or “(II) on July 1, 2000, and at 2-year intervals thereafter, except to

the extent that different years for the repeating of such proceedings may be determined in accordance with subparagraph (A).

“(iii) The procedures specified in subparagraph (B) shall be concluded in accordance with section 802. “(3) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any determination by a copyright arbitration “(4)(A) The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings. “(B) Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording— “(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or “(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection. “(C) Any royalty payments in arrears shall be made on or before the twentieth day of the month next succeeding the month in which the royalty fees are set.”.

(3) Subsection (g) is amended—

(A) in the subsection heading by striking “SUBSCRIPTION”;

(B) in paragraph (1) in the matter preceding subparagraph (A), by striking “subscription transmission licensed” and inserting “transmission licensed under a statutory license”;

(C) in subparagraphs (A) and (B) by striking “subscription”; and

(D) in paragraph (2) by striking “subscription”. (4) Subsection (j) is amended—

(A) by striking paragraphs (4) and (9) and redesignating paragraphs (2), (3), (5), (6), (7), and (8) as paragraphs (3), (5), (9), (12), (13), and (14), respectively;

Regulations.

(B) by inserting after paragraph (1) the following: “(2) An ‘archived program’ is a predetermined program that is available repeatedly on the demand of the transmission recipient and that is performed in the same order from the beginning, except that an archived program shall not include a recorded event or broadcast transmission that makes no more than an incidental use of sound recordings, as long as such recorded event or broadcast transmission does not contain an entire sound recording or feature a particular sound recording.”; (C) by inserting after paragraph (3), as so redesignated, the following: “(4) A ‘continuous program’ is a predetermined program that is continuously performed in the same order and that is accessed at a point in the program that is beyond the control of the transmission recipient.”; (D) by inserting after paragraph (5), as so redesignated, the following: “(6) An ‘eligible nonsubscription transmission’ is a noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other musicrelated events.

“(7) An ‘interactive service’ is one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either

concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service.

“(8) A ‘new subscription service’ is a service that performs sound recordings by means of noninteractive subscription digital audio transmissions and that is not a preexisting subscription service or a preexisting satellite digital audio radio service.”; (E) by inserting after paragraph (9), as so redesignated, the following: “(10) A ‘preexisting satellite digital audio radio service’ is a subscription satellite digital audio radio service provided pursuant to a satellite digital audio radio service license issued by the Federal Communications Commission on or before July 31, 1998, and any renewal of such license to the extent of the scope of the original license, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.

“(11) A ‘preexisting subscription service’ is a service that performs sound recordings by means of noninteractive audioonly subscription digital audio transmissions, which was in existence and was making such transmissions to the public for a fee on or before July 31, 1998, and may include a limited number of sample channels representative of the subscription service that are made available on a nonsubscription basis in order to promote the subscription service.”; and (F) by adding at the end the following: “(15) A ‘transmission’ is either an initial transmission or a retransmission.”. (5) The amendment made by paragraph (2)(B)(i)(III) of this subsection shall be deemed to have been enacted as part of the Digital Performance Right in Sound Recordings Act of 1995, and the publication of notice of proceedings under section 114(f)(1) of title 17, United States Code, as in effect upon the effective date of that Act, for the determination of royalty payments shall be deemed to have been made for the period beginning on the effective date of that Act and ending on December 1, 2001.

(6) The amendments made by this subsection do not annul, limit, or otherwise impair the rights that are preserved by section 114 of title 17, United States Code, including the rights preserved by subsections (c), (d)(4), and (i) of such section.

(b) EPHEMERAL RECORDINGS.—Section 112 of title 17, United States Code, is amended— (1) by redesignating subsection (e) as subsection (f); and (2) by inserting after subsection (d) the following: “(e) STATUTORY LICENSE.—(1) A transmitting organization entitled to transmit to the public a performance of a sound recording under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv) or under a statutory license in accordance with section 114(f) is entitled to a statutory license, under the conditions specified by this subsection, to make no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more), if the following conditions are satisfied:

“(A) The phonorecord is retained and used solely by the transmitting organization that made it, and no further phonorecords are reproduced from it.

“(B) The phonorecord is used solely for the transmitting organization’s own transmissions originating in the United States under a statutory license in accordance with section 114(f) or the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).

“(C) Unless preserved exclusively for purposes of archival preservation, the phonorecord is destroyed within 6 months from the date the sound recording was first transmitted to the public using the phonorecord.

“(D) Phonorecords of the sound recording have been distributed to the public under the authority of the copyright owner or the copyright owner authorizes the transmitting entity to transmit the sound recording, and the transmitting entity makes the phonorecord under this subsection from a phonorecord lawfully made and acquired under the authority of the copyright owner.

“(3) Notwithstanding any provision of the antitrust laws, any copyright owners of sound recordings and any transmitting organizations entitled to a statutory license under this subsection may negotiate and agree upon royalty rates and license terms

and conditions for making phonorecords of such sound recordings under this section and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

“(4) No later than 30 days after the date of the enactment of the Digital Millennium Copyright Act, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified by paragraph (2) of this subsection during the period beginning on the date of the enactment of such Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. Any copyright owners of sound recordings or any transmitting organizations entitled to a statutory license under this subsection may submit to the Librarian of Congress licenses covering such activities with respect to such sound recordings. The parties to each negotiation proceeding shall bear their own costs.

“(5) In the absence of license agreements negotiated under paragraph (3), during the 60-day period commencing 6 months after publication of the notice specified in paragraph (4), and upon the filing of a petition in accordance with section 803(a)(1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of reasonable rates and terms which, subject to paragraph (6), shall be binding on all copyright owners of sound recordings and transmitting organizations entitled to a statutory license under this subsection during the period beginning on the date of the enactment of the Digital Millennium Copyright Act and ending on December 31, 2000, or such other date as the parties may agree. Such rates shall include a minimum fee for each type of service offered by transmitting organizations. The copyright arbitration royalty panel shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its

decision on economic, competitive, and programming information presented by the parties, including—

“(A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner’s traditional streams of revenue; and

“(B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk. In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms under voluntary Federal Register license agreements negotiated as provided in paragraphs (3) and (4). The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.

“(6) License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more transmitting organizations entitled to obtain a statutory license under this subsection shall be given effect in lieu of any determination by a copyright arbitration royalty panel or decision by the Librarian of Congress. “(7) Publication of a notice of the initiation of voluntary negotiation proceedings as specified in paragraph (4) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, in the first week of January 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (4). The procedures specified in paragraph (5) shall be repeated, in accordance with regulations that the Librarian of Congress shall prescribe, upon filing of a petition in accordance with section 803(a)(1), during a 60-day period commencing on July 1, 2000, and at 2-year intervals thereafter, except to the extent that different years for the repeating of such proceedings may be determined in accordance with paragraph (4).

The procedures specified in paragraph (5) shall be concluded in accordance with section 802. “(8)(A) Any person who wishes to make a phonorecord of a sound recording under a statutory license in accordance with this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording under section 106(1)—

“(i) by complying with such notice requirements as the Librarian of Congress shall prescribe by regulation and by paying royalty fees in accordance with this subsection; or

“(ii) if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection. “(B) Any royalty payments in arrears shall be made on or before the 20th day of the month next succeeding the month in which the royalty fees are set.

“(9) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

“(10) Nothing in this subsection annuls, limits, impairs, or otherwise affects in any way the existence or value of any of Regulations. the exclusive rights of the copyright owners in a sound recording, except as otherwise provided in this subsection, or in a musical work, including the exclusive rights to reproduce and distribute a sound recording or musical work, including by means of a digital phonorecord delivery, under sections 106(1), 106(3), and 115, and the right to perform publicly a sound recording or

musical work, including by means of a digital audio transmission, under sections 106(4) and 106(6).". (c) SCOPE OF SECTION 112(a) OF TITLE 17 NOT AFFECTED.— Nothing in this section or the amendments made by this section shall affect the scope of section 112(a) of title 17, United States Code, or the entitlement of any person to an exemption thereunder.

(d) PROCEDURAL AMENDMENTS TO CHAPTER 8.—Section 802 of title 17, United States Code, is amended— (1) in subsection (f)—

(A) in the first sentence by striking "60" and inserting "90"; and

(B) in the third sentence by striking "that 60-day period" and inserting "an additional 30-day period"; and (2) in subsection (g) by inserting after the second sentence the following: "When this title provides that the royalty rates or terms that were previously in effect are to expire on a specified date, any adjustment by the Librarian of those rates or terms shall be effective as of the day following the date of expiration of the rates or terms that were previously in effect, even if the Librarian's decision is rendered on a later date.". (e) CONFORMING AMENDMENTS.—

(1) Section 801(b)(1) of title 17, United States Code, is amended in the second sentence by striking "sections 114, 115, and 116" and inserting "sections 114(f)(1)(B), 115, and 116".

(2) Section 802(c) of title 17, United States Code, is amended by striking "section 111, 114, 116, or 119, any person entitled to a compulsory license" and inserting "section 111, 112, 114, 116, or 119, any transmitting organization entitled to a statutory license under section 112(f), any person entitled to a statutory license".

(3) Section 802(g) of title 17, United States Code, is amended by striking "sections 111, 114" and inserting "sections 111, 112, 114".

(4) Section 802(h)(2) of title 17, United States Code, is amended by striking "section 111, 114" and inserting "section 111, 112, 114".

(5) Section 803(a)(1) of title 17, United States Code, is amended by striking "sections 114, 115" and inserting "sections 112, 114, 115".

- (6) Section 803(a)(5) of title 17, United States Code, is amended—
- (A) by striking “section 114” and inserting “section 112 or 114”; and
- (B) by striking “that section” and inserting “those sections”.

SEC. 406. ASSUMPTION OF CONTRACTUAL OBLIGATIONS RELATED TO TRANSFERS OF RIGHTS IN MOTION PICTURES.

(a) IN GENERAL.—Part VI of title 28, United States Code, is amended by adding at the end the following new chapter:

“CHAPTER 180—ASSUMPTION OF CERTAIN
CONTRACTUAL OBLIGATIONS

“Sec. 4001. Assumption of contractual obligations related to transfers of rights in motion pictures.

“§ 4001. Assumption of contractual obligations related to transfers of rights in motion pictures

“(a) ASSUMPTION OF OBLIGATIONS.—(1) In the case of a transfer of copyright ownership under United States law in a motion picture (as the terms ‘transfer of copyright ownership’ and ‘motion picture’ are defined in section 101 of title 17) that is produced subject to 1 or more collective bargaining agreements negotiated under the laws of the United States, if the transfer is executed on or after the effective date of this chapter and is not limited to public performance rights, the transfer instrument shall be deemed to incorporate the assumption agreements applicable to the copyright ownership being transferred that are required by the applicable collective bargaining agreement, and the transferee shall be subject to the obligations under each such assumption agreement to make residual payments and provide related notices, accruing after the effective date of the transfer and applicable to the exploitation of the rights transferred, and any remedies under each such assumption agreement for breach of those obligations, as those obligations and remedies are set forth in the applicable collective bargaining agreement, if—

“(A) the transferee knows or has reason to know at the time of the transfer that such collective bargaining agreement was or will be applicable to the motion picture; or

“(B) in the event of a court order confirming an arbitration award against the transferor under the collective bargaining agreement, the transferor does not have the financial ability to satisfy the award within 90 days after the order is issued.

“(2) For purposes of paragraph (1)(A), ‘knows or has reason to know’ means any of the following:

“(A) Actual knowledge that the collective bargaining agreement was or will be applicable to the motion picture.

“(B)(i) Constructive knowledge that the collective bargaining agreement was or will be applicable to the motion picture, arising from recordation of a document pertaining to copyright in the motion picture under section 205 of title 17 or from publication, at a site available to the public on-line that is operated by the relevant union, of information that identifies the motion picture as subject to a collective bargaining agreement with that union, if the site permits commercially reasonable verification of the date on which the information was available for access.

“(ii) Clause (i) applies only if the transfer referred to in subsection (a)(1) occurs—

“(I) after the motion picture is completed, or “(II) before the motion picture is completed and— “(aa) within 18 months before the filing of an application for copyright registration for the motion picture under section 408 of title 17, or “(bb) if no such application is filed, within 18 months before the first publication of the motion picture in the United States. Applicability.

“(C) Awareness of other facts and circumstances pertaining to a particular transfer from which it is apparent that the collective bargaining agreement was or will be applicable to the motion picture.

“(b) SCOPE OF EXCLUSION OF TRANSFERS OF PUBLIC PERFORMANCE RIGHTS.—For purposes of this section, the exclusion under subsection (a) of transfers of copyright ownership in a motion picture that are limited to public performance rights

includes transfers to a terrestrial broadcast station, cable system, or programmer to the extent that the station, system, or programmer is functioning as an exhibitor of the motion picture, either by exhibiting the motion picture on its own network, system, service, or station, or by initiating the transmission of an exhibition that is carried on another network, system, service, or station. When a terrestrial broadcast station, cable system, or programmer, or other transferee, is also functioning otherwise as a distributor or as a producer of the motion picture, the public performance exclusion does not affect any obligations imposed on the transferee to the extent that it is engaging in such functions.

“(c) EXCLUSION FOR GRANTS OF SECURITY INTERESTS.—Subsection (a) shall not apply to— “(1) a transfer of copyright ownership consisting solely of a mortgage, hypothecation, or other security interest; or

“(2) a subsequent transfer of the copyright ownership secured by the security interest described in paragraph (1) by or under the authority of the secured party, including a transfer through the exercise of the secured party’s rights or remedies as a secured party, or by a subsequent transferee. The exclusion under this subsection shall not affect any rights or remedies under law or contract.

“(d) DEFERRAL PENDING RESOLUTION OF BONA FIDE DISPUTE.— A transferee on which obligations are imposed under subsection (a) by virtue of paragraph (1) of that subsection may elect to defer performance of such obligations that are subject to a bona fide dispute between a union and a prior transferor until that dispute is resolved, except that such deferral shall not stay accrual of any union claims due under an applicable collective bargaining agreement.

“(e) SCOPE OF OBLIGATIONS DETERMINED BY PRIVATE AGREEMENT.— Nothing in this section shall expand or diminish the rights, obligations, or remedies of any person under the collective bargaining agreements or assumption agreements referred to in this section.

“(f) FAILURE TO NOTIFY.—If the transferor under subsection (a) fails to notify the transferee under subsection (a) of applicable collective bargaining obligations

before the execution of the transfer instrument, and subsection (a) is made applicable to the transferee solely by virtue of subsection (a)(1)(B), the transferor shall be liable to the transferee for any damages suffered by the transferee as a result of the failure to notify.

“(g) DETERMINATION OF DISPUTES AND CLAIMS.—Any dispute concerning the application of subsections (a) through (f) shall be determined by an action in United States district court, and the court in its discretion may allow the recovery of full costs by or against any party and may also award a reasonable attorney’s fee to the prevailing party as part of the costs.

“(h) STUDY.—The Comptroller General, in consultation with the Register of Copyrights, shall conduct a study of the conditions in the motion picture industry that gave rise to this section, and the impact of this section on the motion picture industry. The Comptroller General shall report the findings of the study to the Congress within 2 years after the effective date of this chapter.”. (b) CONFORMING AMENDMENT.—The table of chapters for part VI of title 28, United States Code, is amended by adding at the end the following:

“180. Assumption of Certain Contractual Obligations 4001”.

SEC. 407. EFFECTIVE DATE.

Except as otherwise provided in this title, this title and the amendments made by this title shall take effect on the date of the enactment of this Act.

TITLE V—PROTECTION OF CERTAIN

ORIGINAL DESIGNS

SEC. 501. SHORT TITLE.

This Act may be referred to as the “Vessel Hull Design Protection Act”.

SEC. 502. PROTECTION OF CERTAIN ORIGINAL DESIGNS.

Title 17, United States Code, is amended by adding at the end the following new chapter:

"CHAPTER 13—PROTECTION OF ORIGINAL DESIGNS

"Sec.

"1301. Designs protected.

"1302. Designs not subject to protection.

"1303. Revisions, adaptations, and rearrangements.

"1304. Commencement of protection.

"1305. Term of protection.

"1306. Design notice.

"1307. Effect of omission of notice.

"1308. Exclusive rights.

"1309. Infringement.

"1310. Application for registration.

"1311. Benefit of earlier filing date in foreign country.

"1312. Oaths and acknowledgments.

"1313. Examination of application and issue or refusal of registration.

"1314. Certification of registration.

"1315. Publication of announcements and indexes.

"1316. Fees.

"1317. Regulations.

"1318. Copies of records.

"1319. Correction of errors in certificates.

"1320. Ownership and transfer.

"1321. Remedy for infringement.

"1322. Injunctions.

"1323. Recovery for infringement.

"1324. Power of court over registration.

"1325. Liability for action on registration fraudulently obtained.

"1326. Penalty for false marking.

"1327. Penalty for false representation.

"1328. Enforcement by Treasury and Postal Service.

"1329. Relation to design patent law.

"1330. Common law and other rights unaffected.

"1331. Administrator; Office of the Administrator.

"1332. No retroactive effect.

"§ 1301. Designs protected

"(a) DESIGNS PROTECTED.—

"(1) IN GENERAL.—The designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter. "(2) VESSEL HULLS.—The design of a vessel hull, including a plug or mold, is subject to protection under this chapter, notwithstanding section 1302(4). "(b) DEFINITIONS.—For the purpose of this chapter, the following terms have the following meanings:

"(1) A design is 'original' if it is the result of the designer's creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.

"(2) A 'useful article' is a vessel hull, including a plug or mold, which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article which normally is part of a useful article shall be deemed to be a useful article.

"(3) A 'vessel' is a craft, especially one larger than a rowboat, designed to navigate on water, but does not include any such craft that exceeds 200 feet in length.

"(4) A 'hull' is the frame or body of a vessel, including the deck of a vessel, exclusive of masts, sails, yards, and rigging.

"(5) A 'plug' means a device or model used to make a mold for the purpose of exact duplication, regardless of whether the device or model has an intrinsic utilitarian

function that is not only to portray the appearance of the product or to convey information.

“(6) A ‘mold’ means a matrix or form in which a substance for material is used, regardless of whether the matrix or form has an intrinsic utilitarian function that is not only to portray the appearance of the product or to convey information.

“§ 1302. Designs not subject to protection

“Protection under this chapter shall not be available for a design that is—

“(1) not original;

“(2) staple or commonplace, such as a standard geometric figure, a familiar symbol, an emblem, or a motif, or another shape, pattern, or configuration which has become standard, common, prevalent, or ordinary;

“(3) different from a design excluded by paragraph (2) only in insignificant details or in elements which are variants commonly used in the relevant trades;

“(4) dictated solely by a utilitarian function of the article that embodies it; or

“(5) embodied in a useful article that was made public by the designer or owner in the United States or a foreign country more than 1 year before the date of the application for registration under this chapter.

“§ 1303. Revisions, adaptations, and rearrangements

“Protection for a design under this chapter shall be available notwithstanding the employment in the design of subject matter excluded from protection under section 1302 if the design is a substantial revision, adaptation, or rearrangement of such subject matter. Such protection shall be independent of any subsisting protection in subject matter employed in the design, and shall not be construed as securing any right to subject matter excluded from protection under this chapter or as extending any subsisting protection under this chapter.

"§ 1304. Commencement of protection

"The protection provided for a design under this chapter shall commence upon the earlier of the date of publication of the registration under section 1313(a) or the date the design is first made public as defined by section 1310(b).

"§ 1305. Term of protection

"(a) IN GENERAL.—Subject to subsection (b), the protection provided under this chapter for a design shall continue for a term of 10 years beginning on the date of the commencement of protection under section 1304.

"(b) EXPIRATION.—All terms of protection provided in this section shall run to the end of the calendar year in which they would otherwise expire.

"(c) TERMINATION OF RIGHTS.—Upon expiration or termination of protection in a particular design under this chapter, all rights under this chapter in the design shall terminate, regardless of the number of different articles in which the design may have been used during the term of its protection.

"§ 1306. Design notice

"(a) CONTENTS OF DESIGN NOTICE.—(1) Whenever any design for which protection is sought under this chapter is made public under section 1310(b), the owner of the design shall, subject to the provisions of section 1307, mark it or have it marked legibly with a design notice consisting of—

"(A) the words 'Protected Design', the abbreviation 'Prot'd Des.', or the letter 'D' with a circle, or the symbol '*D*';

"(B) the year of the date on which protection for the design commenced; and

"(C) the name of the owner, an abbreviation by which the name can be recognized, or a generally accepted alternative designation of the owner. Any distinctive identification of the owner may be used for purposes of subparagraph (C) if it has been recorded by the Administrator before the design marked with such identification is registered. "(2) After registration, the registration number may be used instead of the elements specified in subparagraphs (B) and (C) of paragraph (1).

“(b) LOCATION OF NOTICE.—The design notice shall be so located and applied as to give reasonable notice of design protection while the useful article embodying the design is passing through its normal channels of commerce.

“(c) SUBSEQUENT REMOVAL OF NOTICE.—When the owner of a design has complied with the provisions of this section, protection under this chapter shall not be affected by the removal, destruction, or obliteration by others of the design notice on an article.

“§ 1307. Effect of omission of notice

“(a) ACTIONS WITH NOTICE.—Except as provided in subsection (b), the omission of the notice prescribed in section 1306 shall not cause loss of the protection under this chapter or prevent recovery for infringement under this chapter against any person who, after receiving written notice of the design protection, begins an undertaking leading to infringement under this chapter.

“(b) ACTIONS WITHOUT NOTICE.—The omission of the notice prescribed in section 1306 shall prevent any recovery under section 1323 against a person who began an undertaking leading to infringement under this chapter before receiving written notice of the design protection. No injunction shall be issued under this chapter with respect to such undertaking unless the owner of the design reimburses that person for any reasonable expenditure or contractual obligation in connection with such undertaking that was incurred before receiving written notice of the design protection, as the court in its discretion directs. The burden of providing written notice of design protection shall be on the owner of the design.

“§ 1308. Exclusive rights

“The owner of a design protected under this chapter has the exclusive right to—

“(1) make, have made, or import, for sale or for use in trade, any useful article embodying that design; and

“(2) sell or distribute for sale or for use in trade any useful article embodying that design.

“§ 1309. Infringement

“(a) ACTS OF INFRINGEMENT.—Except as provided in subsection (b), it shall be infringement of the exclusive rights in a design protected under this chapter for any person, without the consent of the owner of the design, within the United States and during the term of such protection, to—

“(1) make, have made, or import, for sale or for use in trade, any infringing article as defined in subsection (e); or

“(2) sell or distribute for sale or for use in trade any such infringing article.

“(b) ACTS OF SELLERS AND DISTRIBUTORS.—A seller or distributor of an infringing article who did not make or import the article shall be deemed to have infringed on a design protected under this chapter only if that person—

“(1) induced or acted in collusion with a manufacturer to make, or an importer to import such article, except that merely purchasing or giving an order to purchase such article in the ordinary course of business shall not of itself constitute such inducement or collusion; or

“(2) refused or failed, upon the request of the owner of the design, to make a prompt and full disclosure of that person’s source of such article, and that person orders or reorders such article after receiving notice by registered or certified mail of the protection subsisting in the design.

“(c) ACTS WITHOUT KNOWLEDGE.—It shall not be infringement under this section to make, have made, import, sell, or distribute, any article embodying a design which was created without knowledge that a design was protected under this chapter and was copied from such protected design.

“(d) ACTS IN ORDINARY COURSE OF BUSINESS.—A person who incorporates into that person’s product of manufacture an infringing article acquired from others in the ordinary course of business, or who, without knowledge of the protected design embodied in an infringing article, makes or processes the infringing article for the account of another person in the ordinary course of business, shall not be deemed to

have infringed the rights in that design under this chapter except under a condition contained in paragraph (1) or (2) of subsection (b). Accepting an order or reorder from the source of the infringing article shall be deemed ordering or reordering within the meaning of subsection (b)(2). “(e) INFRINGING ARTICLE DEFINED.—As used in this section, an ‘infringing article’ is any article the design of which has been copied from a design protected under this chapter, without the consent of the owner of the protected design. An infringing article is not an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium. A design shall not be deemed to have been copied from a protected design if it is original and not substantially similar in appearance to a protected design.

“(f) ESTABLISHING ORIGINALITY.—The party to any action or proceeding under this chapter who alleges rights under this chapter in a design shall have the burden of establishing the design’s originality whenever the opposing party introduces an earlier work which is identical to such design, or so similar as to make prima facie showing that such design was copied from such work.

“(g) REPRODUCTION FOR TEACHING OR ANALYSIS.—It is not an infringement of the exclusive rights of a design owner for a person to reproduce the design in a useful article or in any other form solely for the purpose of teaching, analyzing, or evaluating the appearance, concepts, or techniques embodied in the design, or the function of the useful article embodying the design.

“§ 1310. Application for registration

“(a) TIME LIMIT FOR APPLICATION FOR REGISTRATION.—Protection under this chapter shall be lost if application for registration of the design is not made within 2 years after the date on which the design is first made public.

“(b) WHEN DESIGN IS MADE PUBLIC.—A design is made public when an existing useful article embodying the design is anywhere publicly exhibited, publicly distributed, or offered for sale or sold to the public by the owner of the design or with the owner’s consent.

“(c) APPLICATION BY OWNER OF DESIGN.—Application for registration may be made by the owner of the design.

“(d) CONTENTS OF APPLICATION.—The application for registration shall be made to the Administrator and shall state—

“(1) the name and address of the designer or designers of the design;

“(2) the name and address of the owner if different from the designer;

“(3) the specific name of the useful article embodying the design;

“(4) the date, if any, that the design was first made public, if such date was earlier than the date of the application;

“(5) affirmation that the design has been fixed in a useful article; and

“(6) such other information as may be required by the Administrator.

The application for registration may include a description setting forth the salient features of the design, but the absence of such a description shall not prevent registration under this chapter.

“(e) SWORN STATEMENT.—The application for registration shall be accompanied by a statement under oath by the applicant or the applicant’s duly authorized agent or representative, setting forth, to the best of the applicant’s knowledge and belief—

“(1) that the design is original and was created by the designer or designers named in the application;

“(2) that the design has not previously been registered on behalf of the applicant or the applicant’s predecessor in title; and

“(3) that the applicant is the person entitled to protection and to registration under this chapter. If the design has been made public with the design notice prescribed in section 1306, the statement shall also describe the exact form and position of the design notice.

“(f) EFFECT OF ERRORS.—(1) Error in any statement or assertion as to the utility of the useful article named in the application under this section, the design of which is sought to be registered, shall not affect the protection secured under this

chapter. “(2) Errors in omitting a joint designer or in naming an alleged joint designer shall not affect the validity of the registration, or the actual ownership or the protection of the design, unless it is shown that the error occurred with deceptive intent.

“(g) DESIGN MADE IN SCOPE OF EMPLOYMENT.—In a case in which the design was made within the regular scope of the designer’s employment and individual authorship of the design is difficult or impossible to ascribe and the application so states, the name and address of the employer for whom the design was made may be stated instead of that of the individual designer.

“(h) PICTORIAL REPRESENTATION OF DESIGN.—The application for registration shall be accompanied by two copies of a drawing or other pictorial representation of the useful article embodying the design, having one or more views, adequate to show the design, in a form and style suitable for reproduction, which shall be deemed a part of the application.

“(i) DESIGN IN MORE THAN ONE USEFUL ARTICLE.—If the distinguishing elements of a design are in substantially the same form in different useful articles, the design shall be protected as to all such useful articles when protected as to one of them, but not more than one registration shall be required for the design.

“(j) APPLICATION FOR MORE THAN ONE DESIGN.—More than one design may be included in the same application under such conditions as may be prescribed by the Administrator. For each design included in an application the fee prescribed for a single design shall be paid.

“§ 1311. Benefit of earlier filing date in foreign country

“An application for registration of a design filed in the United States by any person who has, or whose legal representative or predecessor or successor in title has, previously filed an application for registration of the same design in a foreign country which extends to designs of owners who are citizens of the United States, or to applications filed under this chapter, similar protection to that provided under this chapter shall have that same effect as if filed in the United States on the date on which the application was

first filed in such foreign country, if the application in the United States is filed within 6 months after the earliest date on which any such foreign application was filed.

“§ 1312. Oaths and acknowledgments

“(a) IN GENERAL.—Oaths and acknowledgments required by this chapter— “(1) may be made—

“(A) before any person in the United States authorized by law to administer oaths; or

“(B) when made in a foreign country, before any diplomatic or consular officer of the United States authorized to administer oaths, or before any official authorized to administer oaths in the foreign country concerned, whose authority shall be proved by a certificate of a diplomatic or consular officer of the United States; and

“(2) shall be valid if they comply with the laws of the State or country where made.

“(b) WRITTEN DECLARATION IN LIEU OF OATH.—(1) The Administrator may by rule prescribe that any document which is to be filed under this chapter in the Office of the Administrator and which is required by any law, rule, or other regulation to be under oath, may be subscribed to by a written declaration in such form as the Administrator may prescribe, and such declaration shall be in lieu of the oath otherwise required. “(2) Whenever a written declaration under paragraph (1) is used, the document containing the declaration shall state that willful false statements are punishable by fine or imprisonment, or both, pursuant to section 1001 of title 18, and may jeopardize the validity of the application or document or a registration resulting there from.

“§ 1313. Examination of application and issue or refusal of registration

“(a) DETERMINATION OF REGISTRABILITY OF DESIGN; REGISTRATION.— Upon the filing of an application for registration in proper form under section 1310, and upon payment of the fee prescribed under section 1316, the Administrator shall determine

whether or not the application relates to a design which on its face appears to be subject to protection under this chapter, and, if so, the Register shall register the design. Registration under this subsection shall be announced by publication. The date of registration shall be the date of publication.

“(b) REFUSAL TO REGISTER; RECONSIDERATION.—If, in the judgment of the Administrator, the application for registration relates to a design which on its face is not subject to protection under this chapter, the Administrator shall send to the applicant a notice of refusal to register and the grounds for the refusal. Within 3 months after the date on which the notice of refusal is sent, the applicant may, by written request, seek reconsideration of the application. After consideration of such a request, the Administrator shall either register the design or send to the applicant a notice of final refusal to register.

“(c) APPLICATION TO CANCEL REGISTRATION.—Any person who believes he or she is or will be damaged by a registration under this chapter may, upon payment of the prescribed fee, apply to the Administrator at any time to cancel the registration on the Publication. ground that the design is not subject to protection under this chapter, stating the reasons for the request. Upon receipt of an application for cancellation, the Administrator shall send to the owner of the design, as shown in the records of the Office of the Administrator, a notice of the application, and the owner shall have a period of 3 months after the date on which such notice is mailed in which to present arguments to the Administrator for support of the validity of the registration. The Administrator shall also have the authority to establish, by regulation, conditions under which the opposing parties may appear and be heard in support of their arguments. If, after the periods provided for the presentation of arguments have expired, the Administrator determines that the applicant for cancellation has established that the design is not subject to protection under this chapter, the Administrator shall order the registration stricken from the record. Cancellation under this subsection shall be announced by publication, and notice of the Administrator’s final determination with

respect to any application for cancellation shall be sent to the applicant and to the owner of record.

“§ 1314. Certification of registration

“Certificates of registration shall be issued in the name of the United States under the seal of the Office of the Administrator and shall be recorded in the official records of the Office. The certificate shall state the name of the useful article, the date of filing of the application, the date of registration, and the date the design was made public, if earlier than the date of filing of the application, and shall contain a reproduction of the drawing or other pictorial representation of the design. If a description of the salient features of the design appears in the application, the description shall also appear in the certificate. A certificate of registration shall be admitted in any court as prima facie evidence of the facts stated in the certificate

“§ 1315. Publication of announcements and indexes

“(a) PUBLICATIONS OF THE ADMINISTRATOR.—The Administrator shall publish lists and indexes of registered designs and cancellations of designs and may also publish the drawings or other pictorial representations of registered designs for sale or other distribution.

“(b) FILE OF REPRESENTATIVES OF REGISTERED DESIGNS.—The Administrator shall establish and maintain a file of the drawings or other pictorial representations of registered designs. The file shall be available for use by the public under such conditions as the Administrator may prescribe.

“§ 1316. Fees

“The Administrator shall by regulation set reasonable fees for the filing of applications to register designs under this chapter and for other services relating to the administration of this chapter, taking into consideration the cost of providing these services and the benefit of a public record.

"§ 1317. Regulations

"The Administrator may establish regulations for the administration of this chapter.

"§ 1318. Copies of records

"Upon payment of the prescribed fee, any person may obtain a certified copy of any official record of the Office of the Administrator that relates to this chapter. That copy shall be admissible in evidence with the same effect as the original.

"§ 1319. Correction of errors in certificates

"The Administrator may, by a certificate of correction under seal, correct any error in a registration incurred through the fault of the Office, or, upon payment of the required fee, any error of a clerical or typographical nature occurring in good faith but not through the fault of the Office. Such registration, together with the certificate, shall thereafter have the same effect as if it had been originally issued in such corrected form.

"§ 1320. Ownership and transfer

"(a) PROPERTY RIGHT IN DESIGN.—The property right in a design subject to protection under this chapter shall vest in the designer, the legal representatives of a deceased designer or of one under legal incapacity, the employer for whom the designer created the design in the case of a design made within the regular scope of the designer's employment, or a person to whom the rights of the designer or of such employer have been transferred. The person in whom the property right is vested shall be considered the owner of the design.

"(b) TRANSFER OF PROPERTY RIGHT.—The property right in a registered design, or a design for which an application for registration has been or may be filed, may be assigned, granted, conveyed, or mortgaged by an instrument in writing, signed by the owner, or may be bequeathed by will.

"(c) OATH OR ACKNOWLEDGEMENT OF TRANSFER.—An oath or acknowledgment under section 1312 shall be prima facie evidence of the execution of an assignment, grant, conveyance, or mortgage under subsection (b).

“(d) RECORDATION OF TRANSFER.—An assignment, grant, conveyance, or mortgage under subsection (b) shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, unless it is recorded in the Office of the Administrator within 3 months after its date of execution or before the date of such subsequent purchase or mortgage.

“§ 1321. Remedy for infringement

“(a) IN GENERAL.—The owner of a design is entitled, after issuance of a certificate of registration of the design under this chapter, to institute an action for any infringement of the design.

“(b) REVIEW OF REFUSAL TO REGISTER.—(1) Subject to paragraph (2), the owner of a design may seek judicial review of a final refusal of the Administrator to register the design under this chapter by bringing a civil action, and may in the same action, if the court adjudges the design subject to protection under this chapter, enforce the rights in that design under this chapter. “(2) The owner of a design may seek judicial review under this section if—

“(A) the owner has previously duly filed and prosecuted to final refusal an application in proper form for registration of the design;

“(B) the owner causes a copy of the complaint in the action to be delivered to the Administrator within 10 days after the commencement of the action; and

“(C) the defendant has committed acts in respect to the design which would constitute infringement with respect to a design protected under this chapter.

“(c) ADMINISTRATOR AS PARTY TO ACTION.—The Administrator may, at the Administrator’s option, become a party to the action with respect to the issue of registrability of the design claim by entering an appearance within 60 days after being served with the complaint, but the failure of the Administrator to become a party shall not deprive the court of jurisdiction to determine that issue.

“(d) USE OF ARBITRATION TO RESOLVE DISPUTE.—The parties to an infringement dispute under this chapter, within such time as may be specified by the

Administrator by regulation, may determine the dispute, or any aspect of the dispute, by arbitration. Arbitration shall be governed by title 9. The parties shall give notice of any arbitration award to the Administrator, and such award shall, as between the parties to the arbitration, be dispositive of the issues to which it relates. The arbitration award shall be unenforceable until such notice is given. Nothing in this subsection shall preclude the Administrator from determining whether a design is subject to registration in a cancellation proceeding under section 1313(c).

§ 1322. Injunctions

“(a) IN GENERAL.—A court having jurisdiction over actions under this chapter may grant injunctions in accordance with the principles of equity to prevent infringement of a design under this chapter, including, in its discretion, prompt relief by temporary restraining orders and preliminary injunctions.

“(b) DAMAGES FOR INJUNCTIVE RELIEF WRONGFULLY OBTAINED.—A seller or distributor who suffers damage by reason of injunctive relief wrongfully obtained under this section has a cause of action against the applicant for such injunctive relief and may recover such relief as may be appropriate, including damages for lost profits, cost of materials, loss of good will, and punitive damages in instances where the injunctive relief was sought in bad faith, and, unless the court finds extenuating circumstances, reasonable attorney’s fees.

“§ 1323. Recovery for infringement

“(a) DAMAGES.—Upon a finding for the claimant in an action for infringement under this chapter, the court shall award the claimant damages adequate to compensate for the infringement. In addition, the court may increase the damages to such amount, not exceeding \$50,000 or \$1 per copy, whichever is greater, as the court determines to be just. The damages awarded shall constitute compensation and not a penalty. The court may receive expert testimony as an aid to the determination of damages.

“(b) INFRINGER’S PROFITS.—As an alternative to the remedies provided in subsection (a), the court may award the claimant the infringer’s profits resulting from the sale of the copies if the court finds that the infringer’s sales are reasonably related to the use of the claimant’s design. In such a case, the claimant shall be required to prove only the amount of the infringer’s sales and the infringer shall be required to prove its expenses against such sales.

“(c) STATUTE OF LIMITATIONS.—No recovery under subsection (a) or (b) shall be had for any infringement committed more than 3 years before the date on which the complaint is filed.

“(d) ATTORNEY’S FEES.—In an action for infringement under this chapter, the court may award reasonable attorney’s fees to the prevailing party.

“(e) DISPOSITION OF INFRINGING AND OTHER ARTICLES.—The court may order that all infringing articles, and any plates, molds, patterns, models, or other means specifically adapted for making the articles, be delivered up for destruction or other disposition as the court may direct.

“§ 1324. Power of court over registration

“In any action involving the protection of a design under this chapter, the court, when appropriate, may order registration of a design under this chapter or the cancellation of such a registration. Any such order shall be certified by the court to the Administrator, who shall make an appropriate entry upon the record.

“§ 1325. Liability for action on registration fraudulently obtained

“Any person who brings an action for infringement knowing that registration of the design was obtained by a false or fraudulent representation materially affecting the rights under this chapter, shall be liable in the sum of \$10,000, or such part of that amount as the court may determine. That amount shall be to compensate the defendant and shall be charged against the plaintiff and paid to the defendant, in addition to such costs and attorney’s fees of the defendant as may be assessed by the court.

“§ 1326. Penalty for false marking

“(a) IN GENERAL.—Whoever, for the purpose of deceiving the public, marks upon, applies to, or uses in advertising in connection with an article made, used, distributed, or sold, a design which is not protected under this chapter, a design notice specified in section 1306, or any other words or symbols importing that the design is protected under this chapter, knowing that the design is not so protected, shall pay a civil fine of not more than \$500 for each such offense.

“(b) SUIT BY PRIVATE PERSONS.—Any person may sue for the penalty established by subsection (a), in which event one-half of the penalty shall be awarded to the person suing and the remainder shall be awarded to the United States.

“§ 1327. Penalty for false representation

“Whoever knowingly makes a false representation materially affecting the rights obtainable under this chapter for the purpose of obtaining registration of a design under this chapter shall pay a penalty of not less than \$500 and not more than \$1,000, and any rights or privileges that individual may have in the design under this chapter shall be forfeited.

“§ 1328. Enforcement by Treasury and Postal Service

“(a) REGULATIONS.—The Secretary of the Treasury and the United States Postal Service shall separately or jointly issue regulations for the enforcement of the rights set forth in section 1308 with respect to importation. Such regulations may require, as a condition for the exclusion of articles from the United States, that the person seeking exclusion take any one or more of the following actions:

“(1) Obtain a court order enjoining, or an order of the International Trade Commission under section 337 of the Tariff Act of 1930 excluding, importation of the articles.

“(2) Furnish proof that the design involved is protected under this chapter and that the importation of the articles would infringe the rights in the design under this chapter.

“(3) Post a surety bond for any injury that may result if the detention or exclusion of the articles proves to be unjustified. “(b) SEIZURE AND FORFEITURE.—Articles imported in violation of the rights set forth in section 1308 are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Any such forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, as the case may be, except that the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury that the importer had no reasonable grounds for believing that his or her acts constituted a violation of the law.

“§ 1329. Relation to design patent law

“The issuance of a design patent under title 35, United States Code, for an original design for an article of manufacture shall terminate any protection of the original design under this chapter.

“§ 1330. Common law and other rights unaffected

“Nothing in this chapter shall annul or limit—

“(1) common law or other rights or remedies, if any, available to or held by any person with respect to a design which has not been registered under this chapter; or

“(2) any right under the trademark laws or any right protected against unfair competition.

“§ 1331. Administrator; Office of the Administrator

“In this chapter, the ‘Administrator’ is the Register of Copyrights, and the ‘Office of the Administrator’ and the ‘Office’ refer to the Copyright Office of the Library of Congress.

“§ 1332. No retroactive effect

“Protection under this chapter shall not be available for any design that has been made public under section 1310(b) before the effective date of this chapter.” .

SEC. 503. CONFORMING AMENDMENTS.

(a) TABLE OF CHAPTERS.—The table of chapters for title 17, United States Code, is amended by adding at the end the following:

(b) JURISDICTION OF DISTRICT COURTS OVER DESIGN ACTIONS.—

(1) Section 1338(c) of title 28, United States Code, is amended by inserting “, and to exclusive rights in designs under chapter 13 of title 17,” after “title 17”. (2)(A) The section heading for section 1338 of title 28, United States Code, is amended by inserting “designs,” after “mask works,”.

(B) The item relating to section 1338 in the table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by inserting “designs,” after “mask works,”. (c) PLACE FOR BRINGING DESIGN ACTIONS.—(1) Section 1400(a) of title 28, United States Code, is amended by inserting “or designs” after “mask works”. (2) The section heading for section 1400 of title 28, United States Code, is amended to read as follows:

“Patents and copyrights, mask works, and designs”.

(3) The item relating to section 1400 in the table of sections at the beginning of chapter 87 of title 28, United States Code, is amended to read as follows: “1400. Patents and copyrights, mask works, and designs.”. (d) ACTIONS AGAINST THE UNITED STATES.—Section 1498(e) of title 28, United States Code, is amended by inserting “, and to exclusive rights in designs under chapter 13 of title 17,” after “title 17”.

SEC. 504. JOINT STUDY OF THE EFFECT OF THIS TITLE.

(a) IN GENERAL.—Not later than 1 year after the date of the enactment of this Act, and not later than 2 years after such date of enactment, the Register of Copyrights and the Commissioner of Patents and Trademarks shall submit to the Committees on

the Judiciary of the Senate and the House of Representatives a joint report evaluating the effect of the amendments made by this title.

(b) ELEMENTS FOR CONSIDERATION.—In carrying out subsection (a), the Register of Copyrights and the Commissioner of Patents and Trademarks shall consider— (1) the extent to which the amendments made by this title has been effective in suppressing infringement of the design of vessel hulls;

(2) the extent to which the registration provided for in chapter 13 of title 17, United States Code, as added by this title, has been utilized;

(3) the extent to which the creation of new designs of vessel hulls have been encouraged by the amendments made by this title;

(4) the effect, if any, of the amendments made by this title on the price of vessels with hulls protected under such amendments; and

(5) such other considerations as the Register and the Commissioner may deem relevant to accomplish the purposes of the evaluation conducted under subsection (a).

SEC. 505. EFFECTIVE DATE.

The amendments made by sections 502 and 503 shall take effect on the date of the enactment of this Act and shall remain in effect until the end of the 2-year period beginning on such date of enactment. No cause of action based on chapter 13 of title 17, United States Code, as added by this title, may be filed after the end of that 2-year period.

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Directive 2000/31/EC of the European Parliament and Council Directive on certain legal aspects of information society services, in particular electronic commerce, in the Internet Market (EC Directive on Electronic Commerce)

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof, Having regard to the proposal from the Commission(1), Having regard to the opinion of the Economic and Social Committee(2), Acting in accordance with the procedure laid down in Article 251 of the Treaty(3), Whereas:

(1) The European Union is seeking to forge ever closer links between the States and peoples of Europe, to ensure economic and social progress; in accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movements of goods, services and the freedom of establishment are ensured; the development of information society services within the area without internal frontiers is vital to eliminating the barriers which divide the European peoples.

(2) The development of electronic commerce within the information society offers significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry, provided that everyone has access to the Internet.

(3) Community law and the characteristics of the Community legal order are a vital asset to enable European citizens and operators to take full advantage, without consideration of borders, of the opportunities afforded by electronic commerce; this

Directive therefore has the purpose of ensuring a high level of Community legal integration in order to establish a real area without internal borders for information society services.

(4) It is important to ensure that electronic commerce could fully benefit from the internal market and therefore that, as with Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities(4), a high level of Community integration is achieved.

(5) The development of information society services within the Community is hampered by a number of legal obstacles to the proper functioning of the internal market which make less attractive the exercise of the freedom of establishment and the freedom to provide services; these obstacles arise from divergences in legislation and from the legal uncertainty as to which national rules apply to such services; in the absence of coordination and adjustment of legislation in the relevant areas, obstacles might be justified in the light of the case-law of the Court of Justice of the European Communities; legal uncertainty exists with regard to the extent to which Member States may control services originating from another Member State.

(6) In the light of Community objectives, of Articles 43 and 49 of the Treaty and of secondary Community law, these obstacles should be eliminated by coordinating certain national laws and by clarifying certain legal concepts at Community level to the extent necessary for the proper functioning of the internal market; by dealing only with certain specific matters which give rise to problems for the internal market, this Directive is fully consistent with the need to respect the principle of subsidiarity as set out in Article 5 of the Treaty.

(7) In order to ensure legal certainty and consumer confidence, this Directive must lay down a clear and general framework to cover certain legal aspects of electronic commerce in the internal market.

(8) The objective of this Directive is to create a legal framework to ensure the free movement of information society services between Member States and not to harmonise the field of criminal law as such.

(9) The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression.

(10) In accordance with the principle of proportionality, the measures provided for in this Directive are strictly limited to the minimum needed to achieve the objective of the proper functioning of the internal market; where action at Community level is necessary, and in order to guarantee an area which is truly without internal frontiers as far as electronic commerce is concerned, the Directive must ensure a high level of protection of objectives of general interest, in particular the protection of minors and human dignity, consumer protection and the protection of public health; according to Article 152 of the Treaty, the protection of public health is an essential component of other Community policies.

(11) This Directive is without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts; amongst others, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁽⁵⁾ and Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts⁽⁶⁾ form a vital element for protecting consumers in contractual matters; those Directives also apply in their entirety to information society services; that same Community acquis, which is fully applicable to information society services, also embraces in particular Council Directive

84/450/EEC of 10 September 1984 concerning misleading and comparative advertising(7), Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit(8), Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field(9), Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours(10), Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer production in the indication of prices of products offered to consumers(11), Council Directive 92/59/EEC of 29 June 1992 on general product safety(12), Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects on contracts relating to the purchase of the right to use immovable properties on a timeshare basis(13), Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests(14), Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions concerning liability for defective products(15), Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees(16), the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and Council Directive 92/28/EEC of 31 March 1992 on the advertising of medicinal products(17); this Directive should be without prejudice to Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products(18) adopted within the framework of the internal market, or to directives on the protection of public health; this Directive complements information requirements established by the abovementioned Directives and in particular Directive 97/7/EC.

(12) It is necessary to exclude certain activities from the scope of this Directive, on the grounds that the freedom to provide services in these fields cannot, at this stage,

be guaranteed under the Treaty or existing secondary legislation; excluding these activities does not preclude any instruments which might prove necessary for the proper functioning of the internal market; taxation, particularly value added tax imposed on a large number of the services covered by this Directive, must be excluded from the scope of this Directive.

(13) This Directive does not aim to establish rules on fiscal obligations nor does it pre-empt the drawing up of Community instruments concerning fiscal aspects of electronic commerce.

(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽¹⁹⁾ and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector⁽²⁰⁾ which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet.

(15) The confidentiality of communications is guaranteed by Article 5 Directive 97/66/EC; in accordance with that Directive, Member States must prohibit any kind of interception or surveillance of such communications by others than the senders and receivers, except when legally authorised.

(16) The exclusion of gambling activities from the scope of application of this Directive covers only games of chance, lotteries and betting transactions, which involve

wagering a stake with monetary value; this does not cover promotional competitions or games where the purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.

(17) The definition of information society services already exists in Community law in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services⁽²¹⁾ and in Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access⁽²²⁾; this definition covers any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service; those services referred to in the indicative list in Annex V to Directive 98/34/EC which do not imply data processing and storage are not covered by this definition.

(18) Information society services span a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line; activities such as the delivery of goods as such or the provision of services off-line are not covered; information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service; television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting are not information society services because they are not provided at individual request; by contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail are information society services; the use of

electronic mail or equivalent individual communications for instance by natural persons acting outside their trade, business or profession including their use for the conclusion of contracts between such persons is not an information society service; the contractual relationship between an employee and his employer is not an information society service; activities which by their very nature cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient are not information society services.

(19) The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period; this requirement is also fulfilled where a company is constituted for a given period; the place of establishment of a company providing services via an Internet website is not the place at which the technology supporting its website is located or the place at which its website is accessible but the place where it pursues its economic activity; in cases where a provider has several places of establishment it is important to determine from which place of establishment the service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.

(20) The definition of "recipient of a service" covers all types of usage of information society services, both by persons who provide information on open networks such as the Internet and by persons who seek information on the Internet for private or professional reasons.

(21) The scope of the coordinated field is without prejudice to future Community harmonisation relating to information society services and to future legislation adopted at national level in accordance with Community law; the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting and does not concern Member States' legal

requirements relating to goods such as safety standards, labelling obligations, or liability for goods, or Member States' requirements relating to the delivery or the transport of goods, including the distribution of medicinal products; the coordinated field does not cover the exercise of rights of pre-emption by public authorities concerning certain goods such as works of art.

(22) Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

(23) This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

(24) In the context of this Directive, notwithstanding the rule on the control at source of information society services, it is legitimate under the conditions established in this Directive for Member States to take measures to restrict the free movement of information society services.

(25) National courts, including civil courts, dealing with private law disputes can take measures to derogate from the freedom to provide information society services in conformity with conditions established in this Directive.

(26) Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution

of criminal offences, without there being a need to notify such measures to the Commission.

(27) This Directive, together with the future Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services, contributes to the creating of a legal framework for the on-line provision of financial services; this Directive does not pre-empt future initiatives in the area of financial services in particular with regard to the harmonisation of rules of conduct in this field; the possibility for Member States, established in this Directive, under certain circumstances of restricting the freedom to provide information society services in order to protect consumers also covers measures in the area of financial services in particular measures aiming at protecting investors.

(28) The Member States' obligation not to subject access to the activity of an information society service provider to prior authorisation does not concern postal services covered by Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service⁽²³⁾ consisting of the physical delivery of a printed electronic mail message and does not affect voluntary accreditation systems, in particular for providers of electronic signature certification service.

(29) Commercial communications are essential for the financing of information society services and for developing a wide variety of new, charge-free services; in the interests of consumer protection and fair trading, commercial communications, including discounts, promotional offers and promotional competitions or games, must meet a number of transparency requirements; these requirements are without prejudice to Directive 97/7/EC; this Directive should not affect existing Directives on commercial communications, in particular Directive 98/43/EC.

(30) The sending of unsolicited commercial communications by electronic mail may be undesirable for consumers and information society service providers and may disrupt the smooth functioning of interactive networks; the question of consent by

recipient of certain forms of unsolicited commercial communications is not addressed by this Directive, but has already been addressed, in particular, by Directive 97/7/EC and by Directive 97/66/EC; in Member States which authorise unsolicited commercial communications by electronic mail, the setting up of appropriate industry filtering initiatives should be encouraged and facilitated; in addition it is necessary that in any event unsolicited commercial communities are clearly identifiable as such in order to improve transparency and to facilitate the functioning of such industry initiatives; unsolicited commercial communications by electronic mail should not result in additional communication costs for the recipient.

(31) Member States which allow the sending of unsolicited commercial communications by electronic mail without prior consent of the recipient by service providers established in their territory have to ensure that the service providers consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

(32) In order to remove barriers to the development of cross-border services within the Community which members of the regulated professions might offer on the Internet, it is necessary that compliance be guaranteed at Community level with professional rules aiming, in particular, to protect consumers or public health; codes of conduct at Community level would be the best means of determining the rules on professional ethics applicable to commercial communication; the drawing-up or, where appropriate, the adaptation of such rules should be encouraged without prejudice to the autonomy of professional bodies and associations.

(33) This Directive complements Community law and national law relating to regulated professions maintaining a coherent set of applicable rules in this field.

(34) Each Member State is to amend its legislation containing requirements, and in particular requirements as to form, which are likely to curb the use of contracts by electronic means; the examination of the legislation requiring such adjustment should be systematic and should cover all the necessary stages and acts of the contractual process, including the filing of the contract; the result of this amendment should be to

make contracts concluded electronically workable; the legal effect of electronic signatures is dealt with by Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures⁽²⁴⁾; the acknowledgement of receipt by a service provider may take the form of the on-line provision of the service paid for.

(35) This Directive does not affect Member States' possibility of maintaining or establishing general or specific legal requirements for contracts which can be fulfilled by electronic means, in particular requirements concerning secure electronic signatures.

(36) Member States may maintain restrictions for the use of electronic contracts with regard to contracts requiring by law the involvement of courts, public authorities, or professions exercising public authority; this possibility also covers contracts which require the involvement of courts, public authorities, or professions exercising public authority in order to have an effect with regard to third parties as well as contracts requiring by law certification or attestation by a notary.

(37) Member States' obligation to remove obstacles to the use of electronic contracts concerns only obstacles resulting from legal requirements and not practical obstacles resulting from the impossibility of using electronic means in certain cases.

(38) Member States' obligation to remove obstacles to the use of electronic contracts is to be implemented in conformity with legal requirements for contracts enshrined in Community law.

(39) The exceptions to the provisions concerning the contracts concluded exclusively by electronic mail or by equivalent individual communications provided for by this Directive, in relation to information to be provided and the placing of orders, should not enable, as a result, the by-passing of those provisions by providers of information society services.

(40) Both existing and emerging disparities in Member States' legislation and case-law concerning liability of service providers acting as intermediaries prevent the smooth functioning of the internal market, in particular by impairing the development of cross-border services and producing distortions of competition; service providers have

a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

(41) This Directive strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based.

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

(44) A service provider who deliberately collaborates with one of the recipients of his service in order to undertake illegal acts goes beyond the activities of "mere

conduit" or "caching" and as a result cannot benefit from the liability exemptions established for these activities.

(45) The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.

(46) In order to benefit from a limitation of liability, the provider of an information society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

(49) Member States and the Commission are to encourage the drawing-up of codes of conduct; this is not to impair the voluntary nature of such codes and the possibility for interested parties of deciding freely whether to adhere to such codes.

(50) It is important that the proposed directive on the harmonisation of certain aspects of copyright and related rights in the information society and this Directive come into force within a similar time scale with a view to establishing a clear framework

of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

(51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

(52) The effective exercise of the freedoms of the internal market makes it necessary to guarantee victims effective access to means of settling disputes; damage which may arise in connection with information society services is characterised both by its rapidity and by its geographical extent; in view of this specific character and the need to ensure that national authorities do not endanger the mutual confidence which they should have in one another, this Directive requests Member States to ensure that appropriate court actions are available; Member States should examine the need to provide access to judicial procedures by appropriate electronic means.

(53) Directive 98/27/EC, which is applicable to information society services, provides a mechanism relating to actions for an injunction aimed at the protection of the collective interests of consumers; this mechanism will contribute to the free movement of information society services by ensuring a high level of consumer protection.

(54) The sanctions provided for under this Directive are without prejudice to any other sanction or remedy provided under national law; Member States are not obliged to provide criminal sanctions for infringement of national provisions adopted pursuant to this Directive.

(55) This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

(56) As regards the derogation contained in this Directive regarding contractual obligations concerning contracts concluded by consumers, those obligations should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract.

(57) The Court of Justice has consistently held that a Member State retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.

(58) This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules; this Directive is without prejudice to the results of discussions within international organisations (amongst others WTO, OECD, Uncitral) on legal issues.

(59) Despite the global nature of electronic communications, coordination of national regulatory measures at European Union level is necessary in order to avoid fragmentation of the internal market, and for the establishment of an appropriate European regulatory framework; such coordination should also contribute to the establishment of a common and strong negotiating position in international forums.

(60) In order to allow the unhampered development of electronic commerce, the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

(61) If the market is actually to operate by electronic means in the context of globalisation, the European Union and the major non-European areas need to consult each other with a view to making laws and procedures compatible.

(62) Cooperation with third countries should be strengthened in the area of electronic commerce, in particular with applicant countries, the developing countries and the European Union's other trading partners.

(63) The adoption of this Directive will not prevent the Member States from taking into account the various social, societal and cultural implications which are inherent in the advent of the information society; in particular it should not hinder measures which Member States might adopt in conformity with Community law to achieve social, cultural and democratic goals taking into account their linguistic diversity, national and regional specificities as well as their cultural heritage, and to ensure and maintain public access to the widest possible range of information society services; in any case, the development of the information society is to ensure that Community citizens can have access to the cultural European heritage provided in the digital environment.

(64) Electronic communication offers the Member States an excellent means of providing public services in the cultural, educational and linguistic fields.

(65) The Council, in its resolution of 19 January 1999 on the consumer dimension of the information society⁽²⁵⁾, stressed that the protection of consumers deserved special attention in this field; the Commission will examine the degree to which existing consumer protection rules provide insufficient protection in the context of the information society and will identify, where necessary, the deficiencies of this legislation and those issues which could require additional measures; if need be, the Commission should make specific additional proposals to resolve such deficiencies that will thereby have been identified,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States.

2. This Directive approximates, to the extent necessary for the achievement of the objective set out in paragraph 1, certain national provisions on information society services relating to the internal market, the establishment of service providers, commercial communications, electronic contracts, the liability of intermediaries, codes of conduct, out-of-court dispute settlements, court actions and cooperation between Member States.

3. This Directive complements Community law applicable to information society services without prejudice to the level of protection for, in particular, public health and consumer interests, as established by Community acts and national legislation implementing them in so far as this does not restrict the freedom to provide information society services.

4. This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.

5. This Directive shall not apply to:

(a) the field of taxation;

(b) questions relating to information society services covered by Directives 95/46/EC and 97/66/EC;

(c) questions relating to agreements or practices governed by cartel law;

(d) the following activities of information society services:

- the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,
- the representation of a client and defence of his interests before the courts,
- gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.

6. This Directive does not affect measures taken at Community or national level, in the respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.

Article 2

Definitions

For the purpose of this Directive, the following terms shall bear the following meanings:

(a) "information society services": services within the meaning of Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC;

(b) "service provider": any natural or legal person providing an information society service;

(c) "established service provider": a service provider who effectively pursues an economic activity using a fixed establishment for an indefinite period. The presence and use of the technical means and technologies required to provide the service do not, in themselves, constitute an establishment of the provider;

(d) "recipient of the service": any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

(e) "consumer": any natural person who is acting for purposes which are outside his or her trade, business or profession;

(f) "commercial communication": any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession. The following do not in themselves constitute commercial communications: - information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

- communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration;

(g) "regulated profession": any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three-years' duration⁽²⁶⁾ or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC⁽²⁷⁾;

(h) "coordinated field": requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them.

(i) The coordinated field concerns requirements with which the service provider has to comply in respect of:

- the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification,

- the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider;

- (ii) The coordinated field does not cover requirements such as:
- requirements applicable to goods as such,
 - requirements applicable to the delivery of goods,
 - requirements applicable to services not provided by electronic means.

Article 3

Internal market

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

3. Paragraphs 1 and 2 shall not apply to the fields referred to in the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,
- the protection of public health,
- public security, including the safeguarding of national security and defence,
- the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

- asked the Member State referred to in paragraph 1 to take measures and the latter did not take such measures, or they were inadequate,

- notified the Commission and the Member State referred to in paragraph 1 of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State referred to in paragraph 1, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures in question, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time; where it comes to the conclusion that the measure is incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.

CHAPTER II

PRINCIPLES

Section 1: Establishment and information requirements

Article 4 Principle excluding prior authorisation

1. Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorisation or any other requirement having equivalent effect.

2. Paragraph 1 shall be without prejudice to authorisation schemes which are not specifically and exclusively targeted at information society services, or which are covered by Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences in the field of telecommunications services⁽²⁸⁾.

Article 5 General information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established;
- (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;
- (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register;
- (e) where the activity is subject to an authorisation scheme, the particulars of the relevant supervisory authority;
- (f) as concerns the regulated professions:
 - any professional body or similar institution with which the service provider is registered,
 - the professional title and the Member State where it has been granted,

- a reference to the applicable professional rules in the Member State of establishment and the means to access them;

(g) where the service provider undertakes an activity that is subject to VAT, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment(29).

2. In addition to other information requirements established by Community law, Member States shall at least ensure that, where information society services refer to prices, these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

Section 2: Commercial communications

Article 6 Information to be provided

In addition to other information requirements established by Community law, Member States shall ensure that commercial communications which are part of, or constitute, an information society service comply at least with the following conditions:

(a) the commercial communication shall be clearly identifiable as such;

(b) the natural or legal person on whose behalf the commercial communication is made shall be clearly identifiable;

(c) promotional offers, such as discounts, premiums and gifts, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions which are to be met to qualify for them shall be easily accessible and be presented clearly and unambiguously;

(d) promotional competitions or games, where permitted in the Member State where the service provider is established, shall be clearly identifiable as such, and the conditions for participation shall be easily accessible and be presented clearly and unambiguously.

Article 7 Unsolicited commercial communication

1. In addition to other requirements established by Community law, Member States which permit unsolicited commercial communication by electronic mail shall ensure that such commercial communication by a service provider established in their territory shall be identifiable clearly and unambiguously as such as soon as it is received by the recipient.

2. Without prejudice to Directive 97/7/EC and Directive 97/66/EC, Member States shall take measures to ensure that service providers undertaking unsolicited commercial communications by electronic mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves.

Article 8 Regulated professions

1. Member States shall ensure that the use of commercial communications which are part of, or constitute, an information society service provided by a member of a regulated profession is permitted subject to compliance with the professional rules regarding, in particular, the independence, dignity and honour of the profession, professional secrecy and fairness towards clients and other members of the profession.

2. Without prejudice to the autonomy of professional bodies and associations, Member States and the Commission shall encourage professional associations and bodies to establish codes of conduct at Community level in order to determine the types of information that can be given for the purposes of commercial communication in conformity with the rules referred to in paragraph 1

3. When drawing up proposals for Community initiatives which may become necessary to ensure the proper functioning of the Internal Market with regard to the information referred to in paragraph 2, the Commission shall take due account of codes of conduct applicable at Community level and shall act in close cooperation with the relevant professional associations and bodies.

4. This Directive shall apply in addition to Community Directives concerning access to, and the exercise of, activities of the regulated professions.

Section 3: Contracts concluded by electronic means

Article 9 Treatment of contracts

1. Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means.

2. Member States may lay down that paragraph 1 shall not apply to all or certain contracts falling into one of the following categories:

- (a) contracts that create or transfer rights in real estate, except for rental rights;

- (b) contracts requiring by law the involvement of courts, public authorities or professions exercising public authority;

- (c) contracts of suretyship granted and on collateral securities furnished by persons acting for purposes outside their trade, business or profession;

- (d) contracts governed by family law or by the law of succession.

3. Member States shall indicate to the Commission the categories referred to in paragraph 2 to which they do not apply paragraph 1. Member States shall submit to the Commission every five years a report on the application of paragraph 2 explaining the reasons why they consider it necessary to maintain the category referred to in paragraph 2(b) to which they do not apply paragraph 1.

Article 10 Information to be provided

1. In addition to other information requirements established by Community law, Member States shall ensure, except when otherwise agreed by parties who are not consumers, that at least the following information is given by the service provider clearly, comprehensibly and unambiguously and prior to the order being placed by the recipient of the service:

- (a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order;

(d) the languages offered for the conclusion of the contract.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically.

3. Contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them.

4. Paragraphs 1 and 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Article 11 Placing of the order

1. Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where the recipient of the service places his order through technological means, the following principles apply:

- the service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means,

- the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.

2. Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order.

3. Paragraph 1, first indent, and paragraph 2 shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Section 4: Liability of intermediary service providers Article 12

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13 "Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

- (a) the provider does not modify the information;
- (b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14 Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15 No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

CHAPTER III IMPLEMENTATION

Article 16 Codes of conduct

1. Member States and the Commission shall encourage:

(a) the drawing up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15;

(b) the voluntary transmission of draft codes of conduct at national or Community level to the Commission;

(c) the accessibility of these codes of conduct in the Community languages by electronic means;

(d) the communication to the Member States and the Commission, by trade, professional and consumer associations or organisations, of their assessment of the application of their codes of conduct and their impact upon practices, habits or customs relating to electronic commerce;

(e) the drawing up of codes of conduct regarding the protection of minors and human dignity.

2. Member States and the Commission shall encourage the involvement of associations or organisations representing consumers in the drafting and

implementation of codes of conduct affecting their interests and drawn up in accordance with paragraph 1(a). Where appropriate, to take account of their specific needs, associations representing the visually impaired and disabled should be consulted.

Article 17 Out-of-court dispute settlement

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

2. Member States shall encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned.

3. Member States shall encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding information society services and to transmit any other information on the practices, usages or customs relating to electronic commerce.

Article 18 Court actions

1. Member States shall ensure that court actions available under national law concerning information society services' activities allow for the rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved.

2. The Annex to Directive 98/27/EC shall be supplemented as follows:

"11. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects on information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) (OJ L 178, 17.7.2000, p. 1)."

Article 19 Cooperation

1. Member States shall have adequate means of supervision and investigation necessary to implement this Directive effectively and shall ensure that service providers supply them with the requisite information.

2. Member States shall cooperate with other Member States; they shall, to that end, appoint one or several contact points, whose details they shall communicate to the other Member States and to the Commission.

3. Member States shall, as quickly as possible, and in conformity with national law, provide the assistance and information requested by other Member States or by the Commission, including by appropriate electronic means.

4. Member States shall establish contact points which shall be accessible at least by electronic means and from which recipients and service providers may:

(a) obtain general information on contractual rights and obligations as well as on the complaint and redress mechanisms available in the event of disputes, including practical aspects involved in the use of such mechanisms;

(b) obtain the details of authorities, associations or organisations from which they may obtain further information or practical assistance.

5. Member States shall encourage the communication to the Commission of any significant administrative or judicial decisions taken in their territory regarding disputes relating to information society services and practices, usages and customs relating to electronic commerce. The Commission shall communicate these decisions to the other Member States.

Article 20 Sanctions

Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.

CHAPTER IV

FINAL PROVISIONS

Article 21 Re-examination

1. Before 17 July 2003, and thereafter every two years, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments in the field of information society services, in particular with respect to crime prevention, the protection of minors, consumer protection and to the proper functioning of the internal market.

2. In examining the need for an adaptation of this Directive, the report shall in particular analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content. The report shall also analyse the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments, and the possibility of applying the internal market principles to unsolicited commercial communications by electronic mail.

Article 22 Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 17 January 2002. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures referred to in paragraph 1, these shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

Article 23 Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 24 Addressees

This Directive is addressed to the Member States.

Done at Luxemburg, 8 June 2000.

Defamation Act 1996

An Act to amend the law of defamation and to amend the law of limitation with respect to actions for defamation or malicious falsehood.

[4th July 1996]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Responsibility for publication

1. Responsibility for publication

(1) In defamation proceedings a person has a defence if he shows that-

- (a) he was not the author, editor or publisher of the statement complained of,
- (b) he took reasonable care in relation to its publication, and
- (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

(2) For this purpose "author", "editor" and "publisher" have the following meanings, which are further explained in subsection (3)-

"author" means the originator of the statement, but does not include a person who did not intend that his statement be published at all;

"editor" means a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it; and

"publisher" means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.

(3) A person shall not be considered the author, editor or publisher of a statement if he is only involved-

(a) in printing, producing, distributing or selling printed material containing the statement;

(b) in processing, making copies of, distributing, exhibiting or selling a film or sound recording (as defined in Part I of the Copyright, Designs and Patents Act 1988) containing the statement;

(c) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;

(d) as the broadcaster of a live programme containing the statement in circumstances in which he has no effective control over the maker of the statement;

(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control

In a case not within paragraphs (a) to (e) the court may have regard to those provisions by way of analogy in deciding whether a person is to be considered the author, editor or publisher of a statement.

(4) Employees or agents of an author, editor or publisher are in the same position as their employer or principal to the extent that they are responsible for the content of the statement or the decision to publish it.

(5) In determining for the purposes of this section whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, regard shall be had to-

(a) the extent of his responsibility for the content of the statement or the decision to publish it,

(b) the nature or circumstances of the publication, and

(c) the previous conduct or character of the author, editor or publisher.

(6) This section does not apply to any cause of action which arose before the section came into force

Offer to make amends

2. Offer to make amends.

(1) A person who has published a statement alleged to be defamatory of another may offer to make amends under this section. (2) The offer may be in relation to the statement generally or in relation to a specific defamatory meaning which the person making the offer accepts that the statement conveys ("a qualified offer"). (3) An offer to make amends-

(a) must be in writing,

(b) must be expressed to be an offer to make amends under section 2 of the Defamation Act 1996, and

(c) must state whether it is a qualified offer and, if so, set out the defamatory meaning in relation to which it is made.

(4) An offer to make amends under this section is an offer-

(a) to make a suitable correction of the statement complained of and a sufficient apology to the aggrieved party,

(b) to publish the correction and apology in a manner that is reasonable and practicable in the circumstances, and

(c) to pay to the aggrieved party such compensation (if any), and such costs, as may be agreed or determined to be payable. The fact that the offer is accompanied by an offer to take specific steps does not affect the fact that an offer to make amends under this section is an offer to do all the things mentioned in paragraphs (a) to (c).

(5) An offer to make amends under this section may not be made by a person after serving a defence in defamation proceedings brought against him by the aggrieved party in respect of the publication in question. (6) An offer to make amends under this section may be withdrawn before it is accepted; and a renewal of an offer which has been withdrawn shall be treated as a new offer.

3. Accepting an offer to make amends.

(1) If an offer to make amends under section 2 is accepted by the aggrieved party, the following provisions apply.

(2) The party accepting the offer may not bring or continue defamation proceedings in respect of the publication concerned against the person making the offer, but he is entitled to enforce the offer to make amends, as follows.

(3) If the parties agree on the steps to be taken in fulfilment of the offer, the aggrieved party may apply to the court for an order that the other party fulfil his offer by taking the steps agreed.

(4) If the parties do not agree on the steps to be taken by way of correction, apology and publication, the party who made the offer may take such steps as he thinks appropriate, and may in particular-

(a) make the correction and apology by a statement in open court in terms approved by the court, and

(b) give an undertaking to the court as to the manner of their publication.

(5) If the parties do not agree on the amount to be paid by way of compensation, it shall be determined by the court on the same principles as damages in defamation proceedings. The court shall take account of any steps taken in fulfilment of the offer and (so far as not agreed between the parties) of the suitability of the correction, the sufficiency of the apology and whether the manner of their publication was reasonable in the circumstances, and may reduce or increase the amount of compensation accordingly.

(6) If the parties do not agree on the amount to be paid by way of costs, it shall be determined by the court on the same principles as costs awarded in court proceedings.

(7) The acceptance of an offer by one person to make amends does not affect any cause of action against another person in respect of the same publication, subject as follows.

(8) In England and Wales or Northern Ireland, for the purposes of the Civil Liability (Contribution) Act 1978-

(a) the amount of compensation paid under the offer shall be treated as paid in bona fide settlement or compromise of the claim; and

(b) where another person is liable in respect of the same damage (whether jointly or otherwise), the person whose offer to make amends was accepted is not required to pay by virtue of any contribution under section 1 of that Act a greater amount than the amount of the compensation payable in pursuance of the offer.

(9) In Scotland-

(a) subsection (2) of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (right of one joint wrongdoer as respects another to recover contribution towards damages) applies in relation to compensation paid under an offer to make amends as it applies in relation to damages in an action to which that section applies; and

(b) where another person is liable in respect of the same damage (whether jointly or otherwise), the person whose offer to make amends was accepted is not required to pay by virtue of any contribution under section 3(2) of that Act a greater amount than the amount of compensation payable in pursuance of the offer.

(10) Proceedings under this section shall be heard and determined without a jury.

4. Failure to accept offer to make amends.

(1) If an offer to make amends under section 2, duly made and not withdrawn, is not accepted by the aggrieved party, the following provisions apply.

(2) The fact that the offer was made is a defence (subject to subsection (3)) to defamation proceedings in respect of the publication in question by that party against

the person making the offer. A qualified offer is only a defence in respect of the meaning to which the offer related.

(3) There is no such defence if the person by whom the offer was made knew or had reason to believe that the statement complained of-

(a) referred to the aggrieved party or was likely to be understood as referring to him, and

(b) was both false and defamatory of that party; but it shall be presumed until the contrary is shown that he did not know and had no reason to believe that was the case.

(4) The person who made the offer need not rely on it by way of defence, but if he does he may not rely on any other defence. If the offer was a qualified offer, this applies only in respect of the meaning to which the offer related.

(5) The offer may be relied on in mitigation of damages whether or not it was relied on as a defence.

Limitation

5. Limitation of actions: England and Wales.

(1) The Limitation Act 1980 is amended as follows.

(2) For section 4A (time limit for action for libel or slander) substitute- 4A. The time limit under section 2 of this Act shall not apply to an action for-

(a) libel or slander, or

(b) slander of title, slander of goods or other malicious falsehood, but no such action shall be brought after the expiration of one year from the date on which the cause of action accrued."

(3) In section 28 (extension of limitation period in case of disability), for subsection (4A) substitute-

"(4A) If the action is one to which section 4A of this Act applies, subsection (1) above shall have effect-

(a) in the case of an action for libel or slander, as if for the words from "at any time" to "occurred)" there were substituted the words "by him at any time

before the expiration of one year from the date on which he ceased to be under a disability"; and

(b) in the case of an action for slander of title, slander of goods or other malicious falsehood, as if for the words "six years" there were substituted the words "one year".

(4) For section 32A substitute-

32A. - (1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-

(a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and

(b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,

the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.

(2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to-

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the end of the period mentioned in section 4A-

(i) the date on which any such facts did become known to him, and

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and

(c) the extent to which, having regard to the delay, relevant evidence is likely-

(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the period mentioned in section 4A.

(3) In the case of an action for slander of title, slander of goods or other malicious falsehood brought by a personal representative-

(a) the references in subsection (2) above to the plaintiff shall be construed as including the deceased person to whom the cause of action accrued and any previous personal representative of that person; and

(b) nothing in section 28(3) of this Act shall be construed as affecting the court's discretion under this section.

(4) In this section "the court" means the court in which the action has been brought."

(5) In section 36(1) (expiry of time limit no bar to equitable relief), for paragraph (aa) substitute-

"(aa) the time limit under section 4A for actions for libel or slander, or for slander of title, slander of goods or other malicious falsehood;"

(6) The amendments made by this section apply only to causes of action arising after the section comes into force.

6. Limitation of actions: Northern Ireland.

(1) The Limitation (Northern Ireland) Order 1989 is amended as follows.

(2) In Article 6 (time limit: certain actions founded on tort) for paragraph (2) substitute-

"(2) Subject to Article 51, an action for damages for-

(a) libel or slander; or

(b) slander of title, slander of goods or other malicious falsehood,

may not be brought after the expiration of one year from the date on which the cause of action accrued."

(3) In Article 48 (extension of time limit), for paragraph (7) substitute-

"(7) Where the action is one to which Article 6(2) applies, paragraph (1) has effect-

(a) in the case of an action for libel and slander, as if for the words from "at any time" to "occurred" there were substituted the words "by him at any time before the expiration of one year from the date on which he ceased to be under a disability"; and

(b) in the case of an action for slander of title, slander of goods or other malicious falsehood, as if for the words "six years" there were substituted the words "one year".

(4) For Article 51 substitute-

"51. Court's power to override time limit: actions for defamation or malicious falsehood.

(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which-

(a) the provisions of Article 6(2) prejudice the plaintiff or any person whom he represents; and

(b) any decision of the court under this paragraph would prejudice the defendant or any person whom he represents,

the court may direct that those provisions are not to apply to the action, or are not to apply to any specified cause of action to which the action relates.

(2) In acting under this Article the court is to have regard to all the circumstances of the case and in particular to-

(a) the length of, and the reasons for, the delay on the part of the plaintiff;

(b) in a case where the reason, or one of the reasons, for the delay was that all or any of the facts relevant to the cause of action did not become known to the plaintiff until after the expiration of the period mentioned in Article 6(2)-

(i) the date on which any such facts did become known to him,
and

(ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
(c) the extent to which, having regard to the delay, relevant evidence is likely-

(i) to be unavailable, or

(ii) to be less cogent than if the action had been brought within the time allowed by Article 6(2).

(3) In the case of an action for slander of title, slander of goods or other malicious falsehood brought by a personal representative-

(a) the references in paragraph (2) to the plaintiff shall be construed as including the deceased person to whom the cause of action accrued and any previous personal representative of that person; and

(b) nothing in Article 48(3) shall be construed as affecting the court's discretion under this Article.

(4) In this Article "the court" means the court in which the action has been brought."

(5) The amendments made by this section apply only to causes of action arising after the section comes into force.

The meaning of a statement

7. Ruling on the meaning of a statement.

In defamation proceedings the court shall not be asked to rule whether a statement is arguably capable, as opposed to capable, of bearing a particular meaning or meanings attributed to it.

Summary disposal of claim

8. Summary disposal of claim

(1) In defamation proceedings the court may dispose summarily of the plaintiff's claim in accordance with the following provisions.

(2) The court may dismiss the plaintiff's claim if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried.

(3) The court may give judgment for the plaintiff and grant him summary relief (see section 9) if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried.

Unless the plaintiff asks for summary relief, the court shall not act under this subsection unless it is satisfied that summary relief will adequately compensate him for the wrong he has suffered.

(4) In considering whether a claim should be tried the court shall have regard to-

(a) whether all the persons who are or might be defendants in respect of the publication complained of are before the court;

(b) whether summary disposal of the claim against another defendant would be inappropriate;

(c) the extent to which there is a conflict of evidence; (d) the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication); and

(e) whether it is justifiable in the circumstances to proceed to a full trial.

(5) Proceedings under this section shall be heard and determined without a jury.

9. Meaning of summary relief.

(1) For the purposes of section 8 (summary disposal of claim) "summary relief" means such of the following as may be appropriate-

(a) a declaration that the statement was false and defamatory of the plaintiff;

(b) an order that the defendant publish or cause to be published a suitable correction and apology;

(c) damages not exceeding £10,000 or such other amount as may be prescribed by order of the Lord Chancellor;

(d) an order restraining the defendant from publishing or further publishing the matter complained of.

(2) The content of any correction and apology, and the time, manner, form and place of publication, shall be for the parties to agree. If they cannot agree on the content, the court may direct the defendant to publish or cause to be published a summary of the court's judgment agreed by the parties or settled by the court in accordance with rules of court. If they cannot agree on the time, manner, form or place of publication, the court may direct the defendant to take such reasonable and practicable steps as the court considers appropriate.

(3) Any order under subsection (1)(c) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

10. Summary disposal: rules of court.

(1) Provision may be made by rules of court as to the summary disposal of the plaintiff's claim in defamation proceedings.

(2) Without prejudice to the generality of that power, provision may be made-

(a) authorising a party to apply for summary disposal at any stage of the proceedings;

(b) authorising the court at any stage of the proceedings-

(i) to treat any application, pleading or other step in the proceedings as an application for summary disposal, or

(ii) to make an order for summary disposal without any such application;

(c) as to the time for serving pleadings or taking any other step in the proceedings in a case where there are proceedings for summary disposal;

(d) requiring the parties to identify any question of law or construction which the court is to be asked to determine in the proceedings;

(e) as to the nature of any hearing on the question of summary disposal, and in particular-

(i) authorising the court to order affidavits or witness statements to be prepared for use as evidence at the hearing, and

(ii) requiring the leave of the court for the calling of oral evidence, or the introduction of new evidence, at the hearing;

(f) authorising the court to require a defendant to elect, at or before the hearing, whether or not to make an offer to make amends under section 2.

11. Summary disposal: application to Northern Ireland.

In their application to Northern Ireland the provisions of sections 8 to 10 (summary disposal of claim) apply only to proceedings in the High Court.

Evidence of convictions

12. Evidence of convictions

(1) In section 13 of the Civil Evidence Act 1968 (conclusiveness of convictions for purposes of defamation actions), in subsections (1) and (2) for "a person" substitute "the plaintiff" and for "that person" substitute "he"; and after subsection (2) insert-

"(2A) In the case of an action for libel or slander in which there is more than one plaintiff-

(a) the references in subsections (1) and (2) above to the plaintiff shall be construed as references to any of the plaintiffs, and

(b) proof that any of the plaintiffs stands convicted of an offence shall be conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other plaintiff."

The amendments made by this subsection apply only where the trial of the action begins after this section comes into force.

(2) In section 12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (conclusiveness of convictions for purposes of defamation actions), in subsections

(1) and (2) for "a person" substitute "the pursuer" and for "that person" substitute "he"; and after subsection (2) insert-

"(2A) In the case of an action for defamation in which there is more than one pursuer-

(a) the references in subsections (1) and (2) above to the pursuer shall be construed as references to any of the pursuers, and

(b) proof that any of the pursuers stands convicted of an offence shall be conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other pursuer."

The amendments made by this subsection apply only for the purposes of an action begun after this section comes into force, whenever the cause of action arose.

(3) In section 9 of the Civil Evidence Act (Northern Ireland) 1971 (conclusiveness of convictions for purposes of defamation actions), in subsections (1) and (2) for "a person" substitute "the plaintiff" and for "that person" substitute "he"; and after subsection (2) insert-

"(2A) In the case of an action for libel or slander in which there is more than one plaintiff-

(a) the references in subsections (1) and (2) to the plaintiff shall be construed as references to any of the plaintiffs, and

(b) proof that any of the plaintiffs stands convicted of an offence shall be conclusive evidence that he committed that offence so far as that fact is relevant to any issue arising in relation to his cause of action or that of any other plaintiff."

The amendments made by this subsection apply only where the trial of the action begins after this section comes into force.

Evidence concerning proceedings in Parliament

13. Evidence concerning proceedings in Parliament

(1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

(2) Where a person waives that protection-

(a) any such enactment or rule of law shall not apply to prevent evidence being given, questions being asked or statements, submissions, comments or findings being made about his conduct, and

(b) none of those things shall be regarded as infringing the privilege of either House of Parliament.

(3) The waiver by one person of that protection does not affect its operation in relation to another person who has not waived it.

(4) Nothing in this section affects any enactment or rule of law so far as it protects a person (including a person who has waived the protection referred to above) from legal liability for words spoken or things done in the course of, or for the purposes of or incidental to, any proceedings in Parliament.

(5) Without prejudice to the generality of subsection (4), that subsection applies to-

(a) the giving of evidence before either House or a committee;

(b) the presentation or submission of a document to either House or a committee;

(c) the preparation of a document for the purposes of or incidental to the transacting of any such business;

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of either House or a committee; and

(e) any communication with the Parliamentary Commissioner for Standards or any person having functions in connection with the registration of members' interests. In this subsection "a committee" means a committee of either House or a joint committee of both Houses of Parliament.

Statutory privilege

14. Reports of court proceedings absolutely privileged.

(1) A fair and accurate report of proceedings in public before a court to which this section applies, if published contemporaneously with the proceedings, is absolutely privileged.

(2) A report of proceedings which by an order of the court, or as a consequence of any statutory provision, is required to be postponed shall be treated as published contemporaneously if it is published as soon as practicable after publication is permitted.

(3) This section applies to-

- (a) any court in the United Kingdom,
- (b) the European Court of Justice or any court attached to that court,
- (c) the European Court of Human Rights, and
- (d) any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the United Kingdom is a party. In paragraph (a) "court" includes any tribunal or body exercising the judicial power of the State.

15. Reports, &c. protected by qualified privilege.

(1) The publication of any report or other statement mentioned in Schedule 1 to this Act is privileged unless the publication is shown to be made with malice, subject as follows.

(2) In defamation proceedings in respect of the publication of a report or other statement mentioned in Part II of that Schedule, there is no defence under this section if the plaintiff shows that the defendant-

- (a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction, and
- (b) refused or neglected to do so. For this purpose "in a suitable manner" means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances.

(3) This section does not apply to the publication to the public, or a section of the public, of matter which is not of public concern and the publication of which is not for the public benefit.

(4) Nothing in this section shall be construed-

(a) as protecting the publication of matter the publication of which is prohibited by law, or

(b) as limiting or abridging any privilege subsisting apart from this section.

Supplementary provisions

16. Repeals.

The enactments specified in Schedule 2 are repealed to the extent specified.

Supplementary provisions

17. Interpretation

(1) In this Act- "publication" and "publish", in relation to a statement, have the meaning they have for the purposes of the law of defamation generally, but "publisher" is specially defined for the purposes of section 1;

"statement" means words, pictures, visual images, gestures or any other method of signifying meaning; and

"statutory provision" means-

(a) a provision contained in an Act or in subordinate legislation within the meaning of the Interpretation Act 1978, or

(b) a statutory provision within the meaning given by section 1(f) of the Interpretation Act (Northern Ireland) 1954.

(2) In this Act as it applies to proceedings in Scotland- "costs" means expenses; and

"plaintiff" and "defendant" mean pursuer and defender.

General provisions

18. Extent.

(1) The following provisions of this Act extend to England and Wales-
section 1 (responsibility for publication),
sections 2 to 4 (offer to make amends), except section 3 (9),
section 5 (time limit for actions for defamation or malicious falsehood),
section 7 (ruling on the meaning of a statement),
sections 8 to 10 (summary disposal of claim),
section 12 (1) (evidence of convictions),
section 13 (evidence concerning proceedings in Parliament),
sections 14 and 15 and Schedule 1 (statutory privilege),
section 16 and Schedule 2 (repeals) so far as relating to enactments extending to England and Wales,
section 17 (1) (interpretation),
this subsection,
section 19 (commencement) so far as relating to provisions which extend to England and Wales, and
section 20 (short title and saving).

(2) The following provisions of this Act extend to Scotland-
section 1 (responsibility for publication),
sections 2 to 4 (offer to make amends), except section 3 (8),
section 12 (2) (evidence of convictions),
section 13 (evidence concerning proceedings in Parliament),
sections 14 and 15 and Schedule 1 (statutory privilege),
section 16 and Schedule 2 (repeals) so far as relating to enactments extending to Scotland,
section 17 (interpretation),
this subsection,
section 19 (commencement) so far as relating to provisions which extend to Scotland,
and

section 20 (short title and saving).

(3) The following provisions of this Act extend to Northern Ireland-
section 1 (responsibility for publication),
sections 2 to 4 (offer to make amends), except section 3 (9),
section 6 (time limit for actions for defamation or malicious falsehood),
section 7 (ruling on the meaning of a statement),
sections 8 to 11 (summary disposal of claim),
section 12 (3) (evidence of convictions),
section 13 (evidence concerning proceedings in Parliament),
sections 14 and 15 and Schedule 1 (statutory privilege),
section 16 and Schedule 2 (repeals) so far as relating to enactments extending to Northern Ireland,
section 17 (1) (interpretation),
this subsection,
section 19 (commencement) so far as relating to provisions which extend to Northern Ireland, and
section 20 (short title and saving).

19. Commencement.

(1) Sections 18 to 20 (extent, commencement and other general provisions) come into force on Royal Assent.

(2) The following provisions of this Act come into force at the end of the period of two months beginning with the day on which this Act is passed-

section 1 (responsibility for publication),
sections 5 and 6 (time limit for actions for defamation or malicious falsehood),
section 12 (evidence of convictions),
section 13 (evidence concerning proceedings in Parliament),
section 16 and the repeals in Schedule 2, so far as consequential on the above provisions, and

section 17 (interpretation), so far as relating to the above provisions.

(3) The provisions of this Act otherwise come into force on such day as may be appointed- (a) for England and Wales or Northern Ireland, by order of the Lord Chancellor, or

(b) for Scotland, by order of the Secretary of State, and different days may be appointed for different purposes. (4) Any such order shall be made by statutory instrument and may contain such transitional provisions as appear to the Lord Chancellor or Secretary of State to be appropriate.

20. Short title and saving.

(1) This Act may be cited as the Defamation Act 1996. (2) Nothing in this Act affects the law relating to criminal libel.

SCHEDULES

SCHEDULE 1 QUALIFIED PRIVILEGE

PART I

STATEMENTS HAVING QUALIFIED PRIVILEGE WITHOUT EXPLANATION OR CONTRADICTION

1. A fair and accurate report of proceedings in public of a legislature anywhere in the world.

2. A fair and accurate report of proceedings in public before a court anywhere in the world.

3. A fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world.

4. A fair and accurate report of proceedings in public anywhere in the world of an international organisation or an international conference.

5. A fair and accurate copy of or extract from any register or other document required by law to be open to public inspection.

6. A notice or advertisement published by or on the authority of a court, or of a judge or officer of a court, anywhere in the world.

7. A fair and accurate copy of or extract from matter published by or on the authority of a government or legislature anywhere in the world.

8. A fair and accurate copy of or extract from matter published anywhere in the world by an international organisation or an international conference.

PART II

STATEMENTS PRIVILEGED SUBJECT TO EXPLANATION OR CONTRADICTION

9. - (1) A fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of-

(a) a legislature in any member State or the European Parliament;

(b) the government of any member State, or any authority performing governmental functions in any member State or part of a member State, or the European Commission;

(c) an international organisation or international conference.

(2) In this paragraph "governmental functions" includes police functions. 10. A fair and accurate copy of or extract from a document made available by a court in any member State or the European Court of Justice (or any court attached to that court), or by a judge or officer of any such court. 11. - (1) A fair and accurate report of proceedings at any public meeting or sitting in the United Kingdom of-

(a) a local authority or local authority committee;

(b) a justice or justices of the peace acting otherwise than as a court exercising judicial authority;

(c) a commission, tribunal, committee or person appointed for the purposes of any inquiry by any statutory provision, by Her Majesty or by a Minister of the Crown or a Northern Ireland Department;

(d) a person appointed by a local authority to hold a local inquiry in pursuance of any statutory provision;

(e) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any statutory provision.

(2) In sub-paragraph (1)(a)- "local authority" means-

(a) in relation to England and Wales, a principal council within the meaning of the Local Government Act 1972, any body falling within any paragraph of section 100J(1) of that Act or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

(b) in relation to Scotland, a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 or an authority or body to which the Public Bodies (Admission to Meetings) Act 1960 applies,

(c) in relation to Northern Ireland, any authority or body to which sections 23 to 27 of the Local Government Act (Northern Ireland) 1972 apply; and 23

"local authority committee" means any committee of a local authority or of local authorities, and includes-

(a) any committee or sub-committee in relation to which sections 100A to 100D of the Local Government Act 1972 apply by virtue of section 100E of that Act (whether or not also by virtue of section 100J of that Act), and

(b) any committee or sub-committee in relation to which sections 50A to 50D of the Local Government (Scotland) Act 1973 apply by virtue of section 50E of that Act.

(3) A fair and accurate report of any corresponding proceedings in any of the Channel Islands or the Isle of Man or in another member State. 12. - (1) A fair and accurate report of proceedings at any public meeting held in a member State. (2) In this paragraph a "public meeting" means a meeting bona fide and lawfully held for a lawful purpose and for the furtherance or discussion of a matter of public concern, whether admission to the meeting is general or restricted. 13. - (1) A fair and accurate report of proceedings at a general meeting of a UK public company. (2) A fair and accurate copy of or extract from any document circulated to members of a UK public company-

(a) by or with the authority of the board of directors of the company,

(b) by the auditors of the company, or

(c) by any member of the company in pursuance of a right conferred by any statutory provision.

(3) A fair and accurate copy of or extract from any document circulated to members of a UK public company which relates to the appointment, resignation, retirement or dismissal of directors of the company.

(4) In this paragraph "UK public company" means- (a) a public company within the meaning of section 1(3) of the Companies Act 1985 or Article 12(3) of the Companies (Northern Ireland) Order 1986, or (b) a body corporate incorporated by or registered under any other statutory provision, or by Royal Charter, or formed in pursuance of letters patent. 24

(5) A fair and accurate report of proceedings at any corresponding meeting of, or copy of or extract from any corresponding document circulated to members of, a public company formed under the law of any of the Channel Islands or the Isle of Man or of another member State. 14. A fair and accurate report of any finding or decision of any of the following descriptions of association, formed in the United Kingdom or another member State, or of any committee or governing body of such an association (a) an association formed for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication;

(b) an association formed for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with that trade, business, industry or profession, or the actions or conduct of those persons;

(c) an association formed for the purpose of promoting or safeguarding the interests of a game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime;

(d) an association formed for the purpose of promoting charitable objects or other objects beneficial to the community and empowered by its constitution to exercise control over or to adjudicate on matters of interest or concern to the association, or the actions or conduct of any person subject to such control or adjudication.

15. - (1) A fair and accurate report of, or copy of or extract from, any adjudication, report, statement or notice issued by a body, officer or other person designated for the purposes of this paragraph-

(a) for England and Wales or Northern Ireland, by order of the Lord Chancellor, and 25

(b) for Scotland, by order of the Secretary of State.

(2) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

PART III

SUPPLEMENTARY PROVISIONS

16. - (1) In this Schedule- "court" includes any tribunal or body exercising the judicial power of the State;

"international conference" means a conference attended by representatives of two or more governments;

"international organisation" means an organisation of which two or more governments are members, and includes any committee or other subordinate body of such an organisation; and

"legislature" includes a local legislature.

(2) References in this Schedule to a member State include any European dependent territory of a member State.

(3) In paragraphs 2 and 6 "court" includes- (a) the European Court of Justice (or any court attached to that court) and the Court of Auditors of the European Communities, (b) the European Court of Human Rights,

(c) any international criminal tribunal established by the Security Council of the United Nations or by an international agreement to which the United Kingdom is a party, and

(d) the International Court of Justice and any other judicial or arbitral tribunal deciding matters in dispute between States.

(4) In paragraphs 1, 3 and 7 "legislature" includes the European Parliament.

17. (1) Provision may be made by order identifying- (a) for the purposes of paragraph 11, the corresponding proceedings referred to in sub-paragraph (3); (b) for the purposes of paragraph 13, the corresponding meetings and documents referred to in sub-paragraph (5).

(2) An order under this paragraph may be made- (a) for England and Wales or Northern Ireland, by the Lord Chancellor, and (b) for Scotland, by the Secretary of State.

(3) An order under this paragraph shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament or in pursuance of a resolution of either House of Parliament.

Statutory Instrument 2002 No.2013 The Electronic Commerce (EC Directive)
Regulations 2002

The Secretary of State, being a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to information society services, in exercise of the powers conferred on her by that section, hereby makes the following Regulations:—

Citation and commencement

1.—(1) These Regulations may be cited as the Electronic Commerce (EC Directive)

Regulations 2002 and except for regulation 16 shall come into force on 21st August 2002.

(2) Regulation 16 shall come into force on 23rd October 2002.

Interpretation

2.—(1) In these Regulations and in the Schedule—

“commercial communication” means a communication, in any form, designed to promote, directly or indirectly, the goods, services or image of any person pursuing a commercial, industrial or craft activity or exercising a regulated profession, other than a communication—

(a) consisting only of information allowing direct access to the activity of that person including a geographic address, a domain name or an electronic mail address; or

(b) relating to the goods, services or image of that person provided that the communication has been prepared independently of the person making it (and for this purpose, a communication prepared without financial consideration

is to be taken to have been prepared independently unless the contrary is shown);

“the Commission” means the Commission of the European Communities;

“consumer” means any natural person who is acting for purposes other than those of his trade, business or profession;

“coordinated field” means requirements applicable to information society service

providers or information society services, regardless of whether they are of a general nature or specifically designed for them, and covers requirements with which the service provider has to comply in respect of—

(a) the taking up of the activity of an information society service, such as requirements concerning qualifications, authorisation or notification, and

(b) the pursuit of the activity of an information society service, such as requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider, but does not cover requirements such as those applicable to goods as such, to the delivery of goods or to services not provided by electronic means;

“the Directive” means Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)(a); “EEA Agreement” means the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993(b);

“enactment” includes an enactment comprised in Northern Ireland legislation and comprised in, or an instrument made under, an Act of the Scottish Parliament;

“enforcement action” means any form of enforcement action including, in particular—

(a) in relation to any legal requirement imposed by or under any enactment, any

action taken with a view to or in connection with imposing any sanction (whether criminal or otherwise) for failure to observe or comply with it; and

(b) in relation to a permission or authorisation, anything done with a view to removing or restricting that permission or authorisation;

“enforcement authority” does not include courts but, subject to that, means any person who is authorised, whether by or under an enactment or otherwise, to take enforcement action;

“established service provider” means a service provider who is a national of a member State or a company or firm as mentioned in Article 48 of the Treaty and who effectively pursues an economic activity by virtue of which he is a service provider using a fixed establishment in a member State for an indefinite period, but the presence and use of the technical means and technologies required to provide the information society service do not, in themselves, constitute an establishment of the provider; in cases where it cannot be determined from which of a number of places of establishment a given service is provided, that service is to be regarded as provided from the place of establishment where the provider has the centre of his activities relating to that service; references to a service provider being established or to the establishment of a service provider shall be construed accordingly;

“information society services” (which is summarised in recital 17 of the Directive as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service”) has the meaning set out in Article 2(a) of the Directive, (which refers to Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations(c), as amended by Directive 98/48/EC of 20 July 1998(d));

“member State” includes a State which is a contracting party to the EEA Agreement;

“recipient of the service” means any person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible;

“regulated profession” means any profession within the meaning of either Article 1(d) of Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years’ duration(a) or of Article 1(f) of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC(b); “service provider” means any person providing an information society service;

“the Treaty” means the treaty establishing the European Community.

(2) In regulation 4 and 5, “requirement” means any legal requirement under the law of the United Kingdom, or any part of it, imposed by or under any enactment or otherwise.

(3) Terms used in the Directive other than those in paragraph (1) above shall have the same meaning as in the Directive.

Exclusions

3.—(1) Nothing in these Regulations shall apply in respect of—

(a) the field of taxation;

(b) questions relating to information society services covered by the Data Protection Directive(c) and the Telecommunications Data Protection Directive(d) and Directive 2002/58/EC of the European Parliament and of the Council of 12th July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)(e);

(c) questions relating to agreements or practices governed by cartel law;

and

(d) the following activities of information society services—

(i) the activities of a public notary or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority,

(ii) the representation of a client and defence of his interests before the courts, and

(iii) betting, gaming or lotteries which involve wagering a stake with monetary value.

(2) These Regulations shall not apply in relation to any Act passed on or after the date these Regulations are made or in exercise of a power to legislate after that date.

(3) In this regulation—

“cartel law” means so much of the law relating to agreements between undertakings, decisions by associations of undertakings or concerted practices as relates to agreements to divide the market or fix prices;

“Data Protection Directive” means Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; and

“Telecommunications Data Protection Directive” means Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector.

Internal market

4.—(1) Subject to paragraph (4) below, any requirement which falls within the coordinated field shall apply to the provision of an information society service by a service provider established in the United Kingdom irrespective of whether that information society service is provided in the United Kingdom or another member State.

(2) Subject to paragraph (4) below, an enforcement authority with responsibility in relation to any requirement in paragraph (1) shall ensure that the provision of an

information society service by a service provider established in the United Kingdom complies with that requirement irrespective of whether that service is provided in the United Kingdom or another member State and any power, remedy or procedure for taking enforcement action shall be available to secure compliance.

(3) Subject to paragraphs (4), (5) and (6) below, any requirement shall not be applied to the provision of an information society service by a service provider established in a member State other than the United Kingdom for reasons which fall within the coordinated field where its application would restrict the freedom to provide information society services to a person in the United Kingdom from that member State.

(4) Paragraphs (1), (2) and (3) shall not apply to those fields in the annex to the Directive set out in the Schedule.

(5) The reference to any requirements the application of which would restrict the freedom to provide information society services from another member State in paragraph (3) above does not include any requirement maintaining the level of protection for public health and consumer interests established by Community acts.

(6) To the extent that anything in these Regulations creates any new criminal offence, it shall not be punishable with imprisonment for more than two years or punishable on summary conviction with imprisonment for more than three months or with a fine of more than level 5 on the standard scale (if not calculated on a daily basis) or with a fine of more than €100 a day(a).

Derogations from Regulation 4

5.—(1) Notwithstanding regulation 4(3), an enforcement authority may take measures, including applying any requirement which would otherwise not apply by virtue of regulation 4(3) in respect of a given information society service, where those measures are necessary for reasons of—

(a) public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of

human dignity concerning individual persons;

(b) the protection of public health;

(c) public security, including the safeguarding of national security and defence,

or

(d) the protection of consumers, including investors,

and proportionate to those objectives.

(2) Notwithstanding regulation 4(3), in any case where an enforcement authority with responsibility in relation to the requirement in question is not party to the proceedings, a court may, on the application of any person or of its own motion, apply any requirement which would otherwise not apply by virtue of regulation 4(3) in respect of a given information society service, if the application of that enactment or requirement is necessary for and proportionate to any of the objectives set out in paragraph (1) above.

(3) Paragraphs (1) and (2) shall only apply where the information society service prejudices or presents a serious and grave risk of prejudice to an objective in paragraph (1)(a) to (d).

(4) Subject to paragraphs (5) and (6), an enforcement authority shall not take the measures in paragraph (1) above, unless it—

(a) asks the member State in which the service provider is established to take measures and the member State does not take such measures or they are inadequate; and

(b) notifies the Commission and the member State in which the service provider is established of its intention to take such measures.

(5) Paragraph (4) shall not apply to court proceedings, including preliminary proceedings and acts carried out in the course of a criminal investigation.

(6) If it appears to the enforcement authority that the matter is one of urgency, it may take the measures under paragraph (1) without first asking the member State in which the service provider is established to take measures and notifying the Commission and the member State in derogation from paragraph (4).

(7) In a case where a measure is taken pursuant to paragraph (6) above, the enforcement authority shall notify the measures taken to the Commission and to the member State concerned in the shortest possible time thereafter and indicate the reasons for urgency.

(8) In paragraph (2), "court" means any court or tribunal.

(a) The maximum penalty allowed under paragraph 1(1)(d) of Schedule 2 of the European Communities Act 1972 c. 68.

General information to be provided by a person providing an information society service

6.—(1) A person providing an information society service shall make available to the recipient of the service and any relevant enforcement authority, in a form and manner which is easily, directly and permanently accessible, the following information—

(a) the name of the service provider;

(b) the geographic address at which the service provider is established;

(c) the details of the service provider, including his electronic mail address, which make it possible to contact him rapidly and communicate with him in a direct and effective manner;

(d) where the service provider is registered in a trade or similar register available to the public, details of the register in which the service provider is entered and his registration number, or equivalent means of identification in that register;

(e) where the provision of the service is subject to an authorisation scheme, the particulars of the relevant supervisory authority;

(f) where the service provider exercises a regulated profession—

(i) the details of any professional body or similar institution with which the service provider is registered;

(ii) his professional title and the member State where that title has been granted;

(iii) a reference to the professional rules applicable to the service provider in the member State of establishment and the means to access them; and

(g) where the service provider undertakes an activity that is subject to value added tax, the identification number referred to in Article 22(1) of the sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the member States relating to turnover taxes—Common system of value added tax: uniform basis of assessment(a).

(2) Where a person providing an information society service refers to prices, these shall be indicated clearly and unambiguously and, in particular, shall indicate whether they are inclusive of tax and delivery costs.

Commercial communications

7. A service provider shall ensure that any commercial communication provided by him and which constitutes or forms part of an information society service shall—

(a) be clearly identifiable as a commercial communication;

(b) clearly identify the person on whose behalf the commercial communication is made;

(c) clearly identify as such any promotional offer (including any discount, premium or gift) and ensure that any conditions which must be met to qualify for it are easily accessible, and presented clearly and unambiguously; and

(d) clearly identify as such any promotional competition or game and ensure that any conditions for participation are easily accessible and presented clearly and unambiguously.

Unsolicited commercial communications

8. A service provider shall ensure that any unsolicited commercial communication sent by him by electronic mail is clearly and unambiguously identifiable as such as soon as it is received.

Information to be provided where contracts are concluded by electronic means

9.—(1) Unless parties who are not consumers have agreed otherwise, where a contract is to be concluded by electronic means a service provider shall, prior to an order being placed by the recipient of a service, provide to that recipient in a clear, comprehensible and unambiguous manner the information set out in (a) to (d) below—

(a) the different technical steps to follow to conclude the contract;

(b) whether or not the concluded contract will be filed by the service provider and whether it will be accessible;

(c) the technical means for identifying and correcting input errors prior to the placing of the order; and

(d) the languages offered for the conclusion of the contract.

(2) Unless parties who are not consumers have agreed otherwise, a service provider shall indicate which relevant codes of conduct he subscribes to and give information on how those codes can be consulted electronically.

(3) Where the service provider provides terms and conditions applicable to the contract to the recipient, the service provider shall make them available to him in a way that allows him to store and reproduce them.

(4) The requirements of paragraphs (1) and (2) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Other information requirements

10. Regulations 6, 7, 8 and 9(1) have effect in addition to any other information requirements in legislation giving effect to Community law.

Placing of the order

11.—(1) Unless parties who are not consumers have agreed otherwise, where the recipient of the service places his order through technological means, a service provider shall—

(a) acknowledge receipt of the order to the recipient of the service without undue delay and by electronic means; and

(b) make available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors prior to the placing of the order.

(2) For the purposes of paragraph (1)(a) above—

(a) the order and the acknowledgement of receipt will be deemed to be received when the parties to whom they are addressed are able to access them; and

(b) the acknowledgement of receipt may take the form of the provision of the service paid for where that service is an information society service.

(3) The requirements of paragraph (1) above shall not apply to contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications.

Meaning of the term “order”

12. Except in relation to regulation 9(1)(c) and regulation 11(1)(b) where “order” shall be the contractual offer, “order” may be but need not be the contractual offer for the purposes of regulations 9 and 11.

Liability of the service provider

13. The duties imposed by regulations 6, 7, 8, 9(1) and 11(1)(a) shall be enforceable, at the suit of any recipient of a service, by an action against the service provider for damages for breach of statutory duty.

Compliance with Regulation 9(3)

14. Where on request a service provider has failed to comply with the requirement in regulation 9(3), the recipient may seek an order from any court having jurisdiction in relation to the contract requiring that service provider to comply with that requirement.

Right to rescind contract

15. Where a person—

(a) has entered into a contract to which these Regulations apply, and

(b) the service provider has not made available means of allowing him to identify and correct input errors in compliance with regulation 11(1)(b), he shall be entitled to rescind the contract unless any court having jurisdiction in relation to the contract in question orders otherwise on the application of the service provider.

Amendments to the Stop Now Orders (E.C. Directive) Regulations 2001

16.—(1) The Stop Now Orders (E.C. Directive) Regulations 2001(a) are amended as follows.

(2) In regulation 2(3), at the end there shall be added—

“(k) regulations 6, 7, 8, 9, and 11 of the Electronic Commerce (E.C. Directive) Regulations 2002.”.

(3) In Schedule 1, at the end there shall be added—

“11. Directive 2000/31/EC of the European Parliament and of the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce).”(b).

Mere conduit

17.—(1) Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service or the provision of access to a communication network, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where the service provider—

(a) did not initiate the transmission;

(b) did not select the receiver of the transmission; and

(c) did not select or modify the information contained in the transmission.

(2) The acts of transmission and of provision of access referred to in paragraph (1) include the automatic, intermediate and transient storage of the information transmitted where:

(a) this takes place for the sole purpose of carrying out the transmission in the communication network, and

(b) the information is not stored for any period longer than is reasonably necessary for the transmission.

Caching

18. Where an information society service is provided which consists of the transmission in a communication network of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that transmission where—

(a) the information is the subject of automatic, intermediate and temporary storage where that storage is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service upon their request, and

(b) the service provider—

(i) does not modify the information;

(ii) complies with conditions on access to the information;

(iii) complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;

(iv) does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and

(v) acts expeditiously to remove or to disable access to the information he has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or

access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

Hosting

19. Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where—

(a) the service provider—

(i) does not have actual knowledge of unlawful activity or information and, where a claim for damages is made, is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful; or

(ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information, and

(b) the recipient of the service was not acting under the authority or the control of the service provider.

Protection of rights

20.—(1) Nothing in regulations 17, 18 and 19 shall—

(a) prevent a person agreeing different contractual terms; or

(b) affect the rights of any party to apply to a court for relief to prevent or stop infringement of any rights.

(2) Any power of an administrative authority to prevent or stop infringement of any rights shall continue to apply notwithstanding regulations 17, 18 and 19.

Defence in Criminal Proceedings: burden of proof

21.—(1) This regulation applies where a service provider charged with an offence in criminal proceedings arising out of any transmission, provision of access or

storage falling within regulation 17, 18 or 19 relies on a defence under any of regulations 17, 18 and 19.

(2) Where evidence is adduced which is sufficient to raise an issue with respect to that defence, the court or jury shall assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not.

Notice for the purposes of actual knowledge

22. In determining whether a service provider has actual knowledge for the purposes of regulations 18(b)(v) and 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to—

(a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes—

- (i) the full name and address of the sender of the notice;
- (ii) details of the location of the information in question; and
- (iii) details of the unlawful nature of the activity or information in question.

TeleService Act (Teledienstegesetz-TDG)

Act on the Utilization of Teleservices

(Teleservices Act - *Teledienstegesetz TDG*) of July 22, 1997, amended last by Article 1 of the bill on legal framework conditions for electronic commerce

I. General Provisions

Section 1 Purpose of the Act

The purpose of this Act is to establish uniform economic conditions for the various applications of electronic information and communication services.

Section 2 Scope

(1) The following provisions shall apply to all electronic information and communication services that are designed for the individual use of combinable data such as characters, images, or sounds and are based on transmission by means of telecommunication (teleservices).

(2) Teleservices within the meaning of Paragraph 1 shall include, in particular,

1. services offered in the field of individual communication (e.g. telebanking, data exchange)
2. services offered for information or communication unless the emphasis is on editorial arrangement to form public opinion (data services such as traffic, weather, environmental, and stock exchange data, the dissemination of information on goods and services)
3. services providing access to the Internet or other networks
4. services offering access to telegames
5. goods and services offered and listed in electronically accessible data bases with interactive access and direct-order facilities.

(3) Paragraph 1 shall apply irrespective of whether the use of the teleservices is free of charge either wholly or partially or requires payment.

(4) This Act shall not apply to

1. telecommunication services and the commercial provision of telecommunication services under Section 3 of the Telecommunications Act of July 25, 1996 (*Telekommunikationsgesetz*, Federal Law Gazette *BGBI.* I page 1120)

2. broadcasting as defined in Section 2 of the Interstate Agreement on Broadcasting (*Rundfunkstaatsvertrag*)

3. content provided by distribution and on-demand services if the emphasis is an editorial arrangement to form public opinion pursuant to Section 2 of the Interstate Agreement on Media Services (*Mediendienste-Staatsvertrag*) signed between January 20 and February 7, 1997

4. the area of taxation.

(5) Legal provisions concerning press law shall remain unaffected.

(6) This Act establishes neither regulations in the field of international private law nor does it address court jurisdiction.

Section 3 Definitions

For the purposes of this Act the term

1. "providers" means natural or legal persons who make available either their own or thirdparty teleservices or who provide access for the use of teleservices

2. "users" means natural or legal persons who utilize teledienste for professional or other purposes, in particular to obtain or make information available

3. "distribution services" means teleservices that are simultaneously rendered to an unlimited number of users via data transmission at no individual request

4. "on-demand services" means teleservices that are rendered by data transmission at the request of a single user

5. "commercial communication" means any form of communication that serves the direct or indirect promotion of the sale of goods, services, or the public image of a company, any other organization, or a natural person who carries out activities in business, industry, the crafts, or in the liberal professions, the following do not in themselves constitute commercial communications:

a) - information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address,

b) communications relating to the goods, services or image of the company, organization or person compiled in an independent manner, particularly when this is without financial consideration;

6. "established service provider" means a provider with a fixed installation who offers or renders commercial teleservices for an indefinite period; the location alone of the technical installation shall not suffice to substantiate a provider's establishment.

A partnership that is authorized to take on rights and liabilities shall enjoy the same status as a legal person.

Section 4 Country of Origin Principle

(1) Established service providers in the Federal Republic of Germany and their teleservices shall be subject to the requirements of domestic law, even in cases in which the teleservices are commercially offered or rendered in another country outside the scope of application of Directive 2000/31/EC of the European Parliament and of the Council of June 8, 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Official Journal of the European Communities L 178 p. 1).

(2) The free trade in such teleservices as are commercially offered or rendered in the Federal Republic of Germany by providers established in a third country lying within the scope of application of Directive 2000/31/EC shall not be restricted. Paragraph 5 shall remain unaffected.

(3) Paragraphs 1 and 2 shall have no effect on

1. the freedom of the parties to choose the law applicable to their contract,
2. contractual obligations concerning consumer contracts,
3. legal statutes on the form of the acquisition of real property and rights equivalent to real property, and the establishment, transferral, alteration, or elimination of real rights in land and rights equivalent to real property.

(4) Paragraphs 1 and 2 shall not apply to

1. the activities of notaries or equivalent professions to the extent that they involve a direct and specific connection with the exercise of public authority
2. the representation of a client and defence of his interests before the courts
3. the permissibility of unsolicited commercial communications by electronic mail
4. gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions
5. the requirements to be met by distribution services
6. copyrights, related property rights, rights as defined by Council Directive 87/54/EEC of December 16, 1986 on the Legal Protection of Topographies of Semiconductor Products (Official Journal L 24, p. 36) and Directive 96/9 of the European Parliament and of the Council of March 11, 1996 on the Legal Protection of Databases (Official Journal L 77, p. 20), and industrial property rights.
7. the dispensing of electronic money by institutes that pursuant to Article 8 Section 1 of Directive 2000/46/EC of the European Parliament and of the Council of September 18, 2000 on the Taking Up, Pursuit, and Prudential Supervision of the Business of Electronic Money Institutions (Official Journal L 275, p. 39) are exempt from the application of some or all of the provisions of this Directive and from the application of Directive 2000/12/EC of the European

Parliament and of the Council of March 20, 2000 Relating to the Taking Up and Pursuit of the Business of Credit Institutions (official Journal L 126, p. 1)

8. questions relating to agreements or practices governed by cartel law

9. The areas covered by Sections 12, 13a to 13c, 55a, 83, 110a to 110d, 111b and 111c of the Law on the Supervision of Insurance Enterprises and by the Ordinance on the Obligation of Insurance Enterprises to Report to the Federal Supervisory Office for Insurance, the statutes applying to insurance contracts and the statutes on compulsory insurances.

10. the regulations applying to the protection of personal data.

(5) In derogation from Paragraph 2, the offering and rendering of a teleservice by a provider established in a third country that is within the scope of Directive 2000/31/EC shall be subject to the restrictions of domestic law to the extent that this law serves to protect

1. the public order, in particular with regard to the prevention, investigation, solution, prosecution and enforcement of criminal acts and administrative offences including the protection of juveniles and measures to combat hate crimes committed for reason of race, sexual orientation, religion, or nationality, as well as to combat violations of individuals' human dignity

2. public safety, in particular the preservation of national security and defense interests

3. public health

4. consumer interests including the protection of investors
from impairment or serious and grave dangers and to the extent that the measures which may be applied on the basis of domestic law are proportional to the goals to be protected. Article 3 Paragraph 4 and 5 of Directive 2000/31/EC provides for consultation and information duties for the procedure to initiate measures pursuant to Sentence 1 – with the exception of judicial proceedings including possible prelitigation procedures and the prosecution of crimes including the carrying out of

sentences and administrative offences.

II. Freedom of Access and Information Duties

Section 5 Freedom of Access

Permits and registration shall not be required for teleservices under the law.

Section 6 General Information Duties

Providers of commercial teleservices shall ensure that at least the following information is easily recognizable, directly accessible, and constantly available:

1. the name and address under which they are established; legal persons shall identify their authorized representative

2. information that allows the user rapid electronic contact and direct communication with the provider, including the e-mail address

3. if the teleservice is offered or rendered as part of an activity requiring government licensing, information on the responsible supervisory agency

4. the commercial register, register of associations, register of partnerships, or public register of cooperatives listing the provider, along with the corresponding registry number.

5. to the extent that the teleservice, in the exercise of a profession as defined under Article 1 Letter d of Council Directive 89/48/EEC of December 21, 1988 on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years' Duration (Official Journal L 019, p. 16) or as defined in Article 1 Letter f of Council Directive 92/51/EEC of June 18, 1992 on a Second General System for the Recognition of Professional Education and Training to Supplement Directive 89/48/EEC (Official Journal L 209, p. 25) amended most recently by Commission Directive 97/38 EC of June 20, 1997 (Official Journal Nr. 184, p. 31), is offered or rendered, information on

- a) the chamber to which the provider belongs

- b) the legal designation of the profession and the country in which the occupational designation was issued

c) the designation of the professional regulations and how these may be accessed

6. the turnover tax identification number under Section 27a of the Turnover Tax Act, if the provider has been assigned such a number. Further duties to provide information, especially after the Act on distance selling (Fernabsatzgesetz), the Act on distance learning (Fernunterrichtsschutzgesetz), the Act on parttime residential rights (Teilzeit-Wohnrechtegesetz) or the Acts on the Information on Prizes and the Act on the Rules for Prizes as well as the Ordinance on the Information on Prizes, (Preisangaben- und Preisklauselgesetz und Preisangabenverordnung), the Act on the Supervision of Insurances (Versicherungsaufsichtsgesetz) as well as after the rules of commercial law remain unaffected.

Section 7 Special Information Duties Regarding Commercial Communication

Providers of commercial communications which are part of, or constitute, a teleservice shall fulfill at least the following conditions:

1. Commercial communications shall be clearly recognizable as such.
2. The natural or legal person on whose behalf commercial communications are transmitted must be clearly identifiable.
3. Promotional offers such as discounts, premiums, and gifts must be clearly identifiable as such and the terms of compliance must be easy to access and clearly and unambiguously outlined.
4. Contests or sweepstakes of a promotional nature must be clearly recognizable as such and the terms of participation must be easy to access and clearly and unambiguously outlined. The terms of the Unfair Competition Act shall remain unaffected.

III. Responsibilities

Section 8 General Principles

(1) Providers shall be responsible for their own information, which they make available for use, under terms of binding law.

(2) Providers as defined under Sections 9 to 11 shall not be obliged to supervise information they have transmitted or stored or to research to determine circumstances that indicate an illegal activity. Obligations to remove or block the use of information under binding law shall remain unaffected even if the provider is not responsible pursuant to Sections 9 to 11.

The confidentiality of communications under Section 85 of the Telecommunications Act shall be observed.

Section 9 Transmission of Information [Mere Conduit]

(1) Providers shall not be responsible for third-party information that they transmit in a communications network or to which they provide user access if they have

1. not initiated the transmission
2. not selected the addressees of the information that has been transmitted
3. not selected or modified the information that has been transmitted. Sentence

1 shall not apply, when the service provider deliberately collaborates with one of the recipients of his service in order to undertake illegal acts.

(2) The transmission of information pursuant to Paragraph 1 and the provision of access to it shall also constitute the automatic, short-term intermediate storage of such information to the extent that this is done only to facilitate the transmission in the communications network and the information is not stored any longer than normally required for transmission purposes.

Section 10 Intermediate Storage to Accelerate Data Transmission [Caching]

Providers shall not be responsible for automatic, intermediate storage for a limited period of time, carried out solely to enhance the efficiency of the transmission of third-party information to other users upon the latter's request, if they

1. do not modify the information
2. comply with conditions on access to the information
3. comply with rules regarding the updating of the information, specified in a

manner widely recognised and used by industry

4. do not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information

5. acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement. Section 9 (1) Sentence 2 shall apply *mutatis mutandis*.

Section 11 Storage of Information [Hosting]

Providers shall not be responsible for third-party information that they store for a user if

1. they have no actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, or

2. acts expeditiously to remove or to disable access to the information as soon as they become aware of such circumstances. Sentence 1 shall not be applied if the user is subordinate to or supervised by the provider.

IV. Monetary Fine Provisions

Section 12 Monetary Fine Provisions

(1) An administrative offence is committed by a person who by intention or negligence, in violation of Section 6 Sentence 1, fails to make information available or does so incorrectly or incompletely.

(2) The administrative offence may be punished by monetary fine not exceeding fifty thousand Euro.

ภาคผนวก ข

Computer Information Network and Internet Security Protection and Management Regulations 1997

(Approved by the State Council on December 11 1997 and promulgated by the Ministry of Public Security on December 30, 1997)

Chapter 1 Comprehensive Regulations

Article 1: In order to strengthen the security and the protection of computer information networks and of the Internet, and to preserve the social order and social stability, these regulations have been established on the basis of the "PRC Computer Information Network Protection Regulations", the "PRC Temporary Regulations on Computer Information Networks and the Internet" and other laws and administrative regulations.

Article 2: The security, protection and management of all computer information networks within the borders of the PRC fall under these regulations.

Article 3: The computer management and supervision organization of the Ministry of Public Security is responsible for the security, protection and management of computer information networks and the Internet. The Computer Management and Supervision organization of the Ministry of Public Security should protect the public security of computer information networks and the Internet as well as protect the legal rights of Internet service providing units and individuals as well as the public interest.

Article 4: No unit or individual may use the Internet to harm national security, disclose state secrets, harm the interests of the State, of society or of a group, the legal rights of citizens, or to take part in criminal activities.

Article 5: No unit or individual may use the Internet to create, replicate, retrieve, or transmit the following kinds of information:

(1) Inciting to resist or breaking the Constitution or laws or the implementation of administrative regulations;

(2) Inciting to overthrow the government or the socialist system;

(3) Inciting division of the country, harming national unification;

(4) Inciting hatred or discrimination among nationalities or harming the unity of the nationalities;

(5) Making falsehoods or distorting the truth, spreading rumors, destroying the order of society;

(6) Promoting feudal superstitions, sexually suggestive material, gambling, violence, murder,

(7) Terrorism or inciting others to criminal activity; openly insulting other people or distorting the truth to slander people;

(8) Injuring the reputation of state organs;

(9) Other activities against the Constitution, laws or administrative regulations.

Article 6: No unit or individual may engage in the following activities which harm the security of computer information networks:

(1) No one may use computer networks or network resources without getting proper prior approval

(2) No one may without prior permission may change network functions or to add or delete information

(3) No one may without prior permission add to, delete, or alter materials stored, processed or being transmitted through the network.

(4) No one may deliberately create or transmit viruses.

(5) Other activities, which harm the network, are also prohibited.

Article 7: The freedom and privacy of network users is protected by law. No unit or individual may, in violation of these regulations, use the Internet to violate the freedom and privacy of network users.

Chapter 2 Responsibility for Security and Protection

Article 8: Units and individuals engaged in Internet business must accept the security supervision, inspection, and guidance of the Public Security organization. This includes providing to the Public Security organization information, materials and digital document, and assisting the Public Security organization to discover and properly handle incidents involving law violations and criminal activities involving computer information networks.

Article 9: The supervisory Article or supervisory units of units which provide service through information network gateways through which information is imported and exported and connecting network units should, according to the law and relevant state regulations assume responsibility for the Internet network gateways as well as the security, protection, and management of the subordinate networks.

Article 10: Connecting network units, entry point units and corporations that use computer information networks and the Internet and other organizations must assume the following responsibilities for network security and protection:

(1) Assume responsibility for network security, protection and management and establish a thoroughly secure, protected and well managed network.

(2) Carry out technical measures for network security and protection. Ensure network operational security and information security.

(3) Assume responsibility for the security education and training of network users

(4) Register units and individuals to whom information is provided. Provide information according to the stipulations of article five.

(5) Establish a system for registering the users of electronic bulletin board systems on the computer information network as well as a system for managing bulletin board information.

(6) If a violation of articles four, five, six or seven is discovered than an unaltered record of the violation should be kept and reported to the local Public Security organization.

(7) According to the relevant State regulations, remove from the network and address, directory or server which has content in violation of article five.

Article 11: The network user should fill out a user application form when applying for network services. The format of this application form is determined by Public Security.

Article 12: Connecting network units, entry point units, and corporations that use computer information networks and the Internet and other organizations (including connecting network units that are inter-provincial, autonomous region, municipalities directly under the Central Government or the branch organization of these units) should, within 30 days of the opening of network connection, carry out the proper registration procedures with a unit designated by the Public Security organization of the provincial, autonomous region, or municipality directly under the Central Government peoples' government.

The units mentioned above have the responsibility to report for the record to the local public security organization information on the units and individuals which have connections to the network. The units must also report in a timely manner to Public Security organization any changes in the information about units or individuals using the network.

Article 13: People who register public accounts should strengthen their management of the account and establish an account registration system. Accounts may not be lent or transferred.

Article 14: Whenever units involved in matters such as national affairs, economic construction, building the national defense, and advanced science and technology are registered, evidence of the approval of the chief administrative Article should be shown.

Appropriate measures should be taken to ensure the security and protection of the computer information network and Internet network links of the units mentioned above.

Chapter 3 Security and Supervision

Article 15: The provincial, autonomous region or municipal Public Security agency or bureau, as well as city and county Public Security organizations should have appropriate organizations to ensure the security, protection and management of the Internet.

Article 16: The Public Security organization computer management and supervision organization should have information on the connecting network units, entry point unit, and users, establish a filing system for this information, maintain statistical information on these files and report to higher level units as appropriate.

Article 17: The Public Security computer management and supervision organization should have establish a system for ensuring the security, protection and

good management of the connecting network units, entry point unit, and users. The Public Security organization should supervise and inspect network security, protection and management and the implementation of security measures.

Article 18: If the Public Security computer management and supervision organization discovers an address, directory or server with content in violation of Article five, then the appropriate units should be notified to close or delete it.

Article 19: The Public Security computer management and supervision organization is responsible for pursuing and dealing with illegal computer information network activities and criminal cases involving computer information networks. Criminal activities in violation of Articles

4 or Article 7 should according to the relevant State regulations, be handed over to the relevant department or to the legal system for appropriate disposition.

Chapter 4 Legal Responsibility

Article 20: For violations of law, administrative regulations or of Article five or Article six of these regulations, the Public Security organization gives a warning and if there income from illegal activities, confiscates the illegal earnings.

For less serious offenses a fine not to exceed 5000 RMB to individuals and 15,000 RMB to work units may be assessed.

For more serious offenses computer and network access can be closed down for six months, and if necessary Public Security can suggest that the business operating license of the concerned unit or the cancellation of its network registration. Management activities that constitute a threat to public order can be punished according to provisions of the public security management penalty articles. Where crimes have occurred, prosecutions for criminal responsibility should be made.

Article 21: Where one of the activities listed below has occurred, the Public Security organization should order that remedial action should be taken with a specific period and give a warning; if there has been illegal income, the income should be confiscated; if remedial action is not taken within the specified period, then a fine of not more than 5,000 RMB may be assessed against the head of the unit and persons directly under the unit head and a fine of not more than 15,000 RMB against the unit; in the case of more offenses, the network and equipment can be closed for up to six months. In serious cases Public Security may suggest that the business license of the organization be canceled and its network registration canceled.

(1) Not setting up a secure system

(2) Not implementing security techniques and protection measures

(3) Not providing security education and training for network users

(4) Not providing information, materials or electronic documentation needed for security, protection and management or providing false information

(5) For not inspecting the content of information transmitted on behalf of someone else or not registering the unit or individual on whose behalf the information was transmitted

(6) Not establishing a system for registering users and managing the information of electronic bulletin boards.

(7) Not removing web addresses and directories or not closing servers according to the relevant state regulations.

(8) Not establishing a system for registering users of public accounts

(9) Lending or transferring accounts

Article 22: Violation of Article 4 or Article 7 of these regulations shall be punished according to the relevant laws and regulations.

Article 23: Violations of Article 11 or Article 12 of these regulations or not fulfilling the responsibility or registering users shall be punished by a warning from Public Security or suspending network operations for six months.

Chapter 5 Additional Regulations

Article 24: These regulations should be consulted with regards to the implementation of the security, protection and management of computer information networks connecting to networks in the Hong Kong Special Administrative Region as well as with networks in the Taiwan and Macao districts.

Article 25: These regulations go into effect on the day of promulgation.

ภาคผนวก ช

Measure for Managing Internet Information Service 2000

(Promulgated on October 1, 2000 by the State Council.)

Article 1: These measures are drawn up for the purpose of regulating Internet information services (IIS) and promoting the healthy and orderly development of such services.

Article 2: IIS providers in the People's Republic of China must abide by these measures.

The term IIS refers to services that provide Internet users with information via the Internet.

Article 3: IIS are divided into commercial and non-commercial providers. Commercial IIS refer to providing Internet users with information via the Internet in exchange for compensation, or providing Web page creation services.

Non-commercial IIS refer to providing Internet users with open-source and shared-information services via the Internet on a non-compensatory basis.

Article 4: The state requires that commercial IIS be licensed and that non-commercial IIS report their services for the official records. No one may provide IIS without a license or without reporting its services.

Article 5: Prior to applying for an operating license or reporting IIS services for

the record, an IIS provider whose services relate to information, the publishing business, education, medical and health care, pharmaceuticals, and medical apparatus; and whose services require the concurrence of the relevant supervisory authorities in accordance with the law, with administrative regulations, or with other relevant state laws, must first obtain the approval of the relevant supervisory authorities.

Article 6: In addition to meeting the requirements set forth in the "PRC]Telecommunications Regulations," a commercial IIS provider must also meet the following requirements:

1. It must have a business development plan and a supporting technical plan;
2. It must have sound measures for Internet and information security, including measures for safeguarding Web sites, and information security and rules for ensuring the safety of users' information; and

3. It must have documents that prove the concurrence of its supervisory authorities if its operations belong to one of the categories listed in Article 5.

Article 7: A commercial IIS provider must apply to the IIS administration of the relevant province, autonomous region or municipality under the central government's direct jurisdiction, or to the State Council department in charge of information industries, for its license to operate an IIS value-added telecommunications business (hereafter "license").

The telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction, or the State Council department in charge of information industries, will finish examining and approving an application within 60 days after receiving the application, and decide whether the application is approved or not. If the application is approved, the

administration will issue an operating license to the applicant; if it is not approved, the administration will notify the applicant in writing and explain the reason.

After applicants receive the licenses, they must use them to go through Registration formalities with the authorities that handle business registration. Article 8: A non-commercial IIS provider must report its operations for the official records at the telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction, or at the State Council department in charge of information industries.

When it does so, it must provide the following information:

1. Basic facts about the sponsor and the person in charge;
2. The Web site address and the services it provides; and
3. Proof of concurrence from the relevant authorities if its services fall within the scope of Article 5.

The telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction must create a record and assign a number to those cases that have furnished all the necessary documents.

Article 9: An IIS provider planning to provide e-announcements shall submit a special application, or special request for the record, in accordance with relevant state regulations when it applies for a commercial IIS license, or when it reports its special request to provide non-commercial IIS for the record.

Article 10: The telecommunications administration of the relevant province autonomous region, or municipality under the central government's direct jurisdiction, or the State Council department in charge of information industries, shall publicize the names of all the IIS providers that have been licensed for operations; or that have had their requests recorded and filed.

Article 11: An IIS provider shall provide the services prescribed in its license or the services it has reported for the record. It may not provide other services than those prescribed in the license or reported for the record. A non-commercial IIS provider may not accept compensation for its services. When an IIS provider changes its services or its Web site address, it shall have the change processed 30 days in advance by the original authorities that approved, licensed, or recorded its services.

Article 12: An IIS provider must display its license or record number in a prominent place on the home page of its Web site.

Article 13: An IIS provider must provide Internet users with high-quality services, and it must guarantee that its information is legal.

Article 14: An IIS providing services related to information, the publishing business, and e-announcements shall record the content of the information, the time that the information is released, and the address or the domain name of the Web site.

An Internet service provider (ISP) must record such information as the time that its subscribers accessed the Internet, the subscribers' account numbers, the addresses or domain names of the Web sites, and the main telephone numbers they use.

An IIS provider and the ISP must keep a copy of their records for 60 days and

furnish them to the relevant state authorities upon demand in accordance with the law.

Article 15: IIS providers shall not produce, reproduce, release, or disseminate information that contains any of the following:

1. Information that goes against the basic principles set in the constitution;
2. Information that endangers national security, divulges state secrets, subverts the government, or undermines national unity;
3. Information that is detrimental to the honor and interests of the state;
4. Information that instigates ethnic hatred or ethnic discrimination, or that undermines national unity;
5. Information that undermines the state's policy towards religions, or that preaches the teachings of evil cults or that promotes feudalistic and superstitious beliefs;
6. Information that disseminates rumors, disturbs social order, or undermines social stability;
7. Information that spreads pornography or other salacious materials; promotes gambling, violence, homicide, or terrorism; or instigates crimes;
8. Information that insults or slanders other people, or infringes upon other people's legitimate rights and interests; or
9. Other information prohibited by the law or administrative regulations.

Article 16: When an IIS provider discovers that the information its Web site provides is clearly of a type listed under Article 15, it should immediately stop transmission, keep the relevant records, and report the situation to the relevant state authorities.

Article 17: When a commercial IIS provider applies to have its business publicly

listed in China or overseas, or to set up a joint venture or partnership with a foreign business, it must have the prior agreement of the State Council department in charge of information industries.

The proportion of the total investment that is supplied by the foreign business shall be in line with the provisions prescribed in the relevant laws and administrative regulations.

Article 18: The State Council department in charge of information industries, and the telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction, shall exercise supervision over IIS providers in accordance with the law.

Departments in charge of information, the publishing business, education, public health, and pharmaceuticals; departments in charge of business administration; and departments in charge of national security, must supervise the contents of Internet information in areas under their respective jurisdictions and in accordance with the law.

Article 19: For those who violate the regulations in these measures by providing unlicensed commercial IIS, or by providing other services than those prescribed by their licenses, the telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction must order them to mend their ways within a specified period, confiscate their illegal incomes, and impose on them a fine between three and five times their illegal incomes.

In cases where there is no illegal income, or in cases where the illegal income is less than 50,000 renminbi (US\$6,039), they must impose on them a fine of between Rmb 100,000 and Rmb 1 million (US\$12,079 and US\$120,788). If the case is serious,

they will be ordered to shut down their Web sites. For those that violate the regulations in these measures by failing to report their operations for the record, by engaging in non-commercial IIS, or by providing other services than those prescribed in the filed records, the telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction will order them to mend their ways within a certain period; and order those who refuse to do so to shut down their Web sites.

Article 20: If the acts of those who produce, reproduce, release, or disseminate information of the types listed in Article 15 constitute a crime, the perpetrators in question will be held accountable for the crime. If their acts do not constitute a crime, they will be penalized by public security or national security authorities in accordance with relevant laws and administrative regulations, such as the "PRC Regulations for Controlling and Penalizing Public Offences," and the "Measures for Protecting and Managing the Security of Computer Information Networks and the Internet". For commercial IIS providers, the licensing authorities will order them to suspend their operations pending rectification of the acts, or revoke their operating licenses, and will report them to the authorities that handle business registration. For non-commercial IIS providers, the authorities that keep their records will order them to shut down their Web sites temporarily or permanently.

Article 21: For those who fail to meet the obligations prescribed in Article 14, the telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction will order them to mend their ways. If the cases are serious, these administrations will order them to suspend their operations pending rectification of the acts, or shut down their Web sites temporarily.

Article 22: For IIS providers that violate the regulations in these measures by failing to display the number of their operating licenses or their filed records on the home pages of their Web sites, the telecommunications administration of the relevant province, autonomous region, or municipality under the central government's direct jurisdiction will order them to mend their ways and impose on them a fine of between Rmb 5,000 and Rmb 50,000 (US\$604 and US\$6,040).

Article 23: For those IIS providers that fail to meet the obligations prescribed in Article 16, the telecommunications administration of the relevant province, autonomous region, or municipality under the direct jurisdiction of the central government will order them to mend their ways. For commercial IIS providers, the licensing authorities will revoke their licenses if their cases are serious; for non-commercial IIS providers, the authorities that keep their records will order them to shut down their Web sites.

Article 24: If IIS providers violate other laws or regulations when providing their services, the relevant supervisory authorities in charge of information, the publishing business, education, public health, pharmaceuticals administration, industry and business administrations or other relevant institutions shall penalize them in accordance with the relevant laws and regulations.

Article 25: When the telecommunications administrations or other relevant supervisory authorities and their personnel neglect their duties, abuse their authority, practice favoritism, commit graft, or ignore their supervision of IIS providers, they will be held accountable if their acts have had grav consequences and constitute a crime. If their acts do not constitute a crime, the supervisors and other personnel who are directly responsible will be disciplined by demotion, removal, or dismissal.

Article 26: IIS providers that began operation before these measures were promulgated must undergo the necessary formalities within 60 days of the promulgation of these measures.

Article 27: These measures take effect upon promulgation.

ภาคผนวก ฅ

ELECTRONIC TRANSACTIONS ACT (CHAPTER 88)

An Act to make provisions for the security and use of electronic transactions and for matters connected therewith.

PART I PRELIMINARY

Short title

1. This Act may be cited as the Electronic Transactions Act.

Interpretation

2. In this Act, unless the context otherwise requires —

"asymmetric cryptosystem" means a system capable of generating a secure key pair, consisting of a private key for creating a digital signature, and a public key to verify the digital signature;

"authorised officer" means a person authorised by the Controller under section 50;

"certificate" means a record issued for the purpose of supporting digital signatures which purports to confirm the identity or other significant characteristics of the person who holds a particular key pair;

"certification authority" means a person who or an organisation that issues a certificate;

"certification practice statement" means a statement issued by a certification authority to specify the practices that the certification authority employs in issuing certificates;

"Controller" means the Controller of Certification Authorities appointed under section 41 (1) and includes a Deputy or an Assistant Controller of Certification Authorities appointed under section 41 (2);

"correspond" , in relation to a private key or public key, means to belong to the same

key pair;

"digital signature" means an electronic signature consisting of a transformation of an electronic record using an asymmetric cryptosystem and a hash function such that a person having the initial untransformed electronic record and the signer's public key can accurately determine —

(a) whether the transformation was created using the private key that corresponds to the signer's public key; and

(b) whether the initial electronic record has been altered since the transformation was made;

"electronic record" means a record generated, communicated, received or stored by electronic, magnetic, optical or other means in an information system or for transmission from one information system to another;

"electronic signature" means any letters, characters, numbers or other symbols in digital form attached to or logically associated with an electronic record, and executed or adopted with the intention of authenticating or approving the electronic record;

"hash function" means an algorithm mapping or translating one sequence of bits into another, generally smaller, set (the hash result) such that —

(a) a record yields the same hash result every time the algorithm is executed using the same record as input;

(b) it is computationally infeasible that a record can be derived or reconstituted from the hash result produced by the algorithm; and

(c) it is computationally infeasible that 2 records can be found that produce the same hash result using the algorithm;

"information" includes data, text, images, sound, codes, computer programs, software and databases;

"key pair" , in an asymmetric cryptosystem, means a private key and its mathematically related public key, having the property that the public key can verify a digital signature that the private key creates;

"licensed certification authority" means a certification authority licensed by the

Controller pursuant to any regulations made under section 42;

"operational period of a certificate" begins on the date and time the certificate is issued by a certification authority (or on a later date and time if stated in the certificate), and ends on the date and time it expires as stated in the certificate or is earlier revoked or suspended;

"private key" means the key of a key pair used to create a digital signature;

"public key" means the key of a key pair used to verify a digital signature;

"record" means information that is inscribed, stored or otherwise fixed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form;

"repository" means a system for storing and retrieving certificates or other information relevant to certificates;

"revoke a certificate" means to permanently end the operational period of a certificate from a specified time;

"rule of law" includes written law;

"security procedure" means a procedure for the purpose of —

(a) verifying that an electronic record is that of a specific person; or

(b) detecting error or alteration in the communication, content or storage of an electronic record since a specific point in time,

which may require the use of algorithms or codes, identifying words or numbers, encryption, answerback or acknowledgment procedures, or similar security devices;

"signed" or "signature" and its grammatical variations include any symbol executed or adopted, or any methodology or procedure employed or adopted, by a person with the intention of authenticating a record, including electronic or digital methods;

"subscriber" means a person who is the subject named or identified in a certificate issued to him and who holds a private key that corresponds to a public key listed in that certificate;

"suspend a certificate" means to temporarily suspend the operational period of a certificate from a specified time;

"trustworthy system" means computer hardware, software and procedures that —

- (a) are reasonably secure from intrusion and misuse;
- (b) provide a reasonable level of availability, reliability and correct operation;
- (c) are reasonably suited to performing their intended functions; and
- (d) adhere to generally accepted security procedures;

"valid certificate" means a certificate that a certification authority has issued and which the subscriber listed in it has accepted;

"verify a digital signature" , in relation to a given digital signature, record and public key, means to determine accurately that —

- (a) the digital signature was created using the private key corresponding to the public key listed in the certificate; and
- (b) the record has not been altered since its digital signature was created.

Purposes and construction

3. This Act shall be construed consistently with what is commercially reasonable under the circumstances and to give effect to the following purposes:

- (a) to facilitate electronic communications by means of reliable electronic records;
- (b) to facilitate electronic commerce, eliminate barriers to electronic commerce resulting from uncertainties over writing and signature requirements, and to promote the development of the legal and business infrastructure necessary to implement secure electronic commerce;
- (c) to facilitate electronic filing of documents with government agencies and statutory corporations, and to promote efficient delivery of government services by means of reliable electronic records;
- (d) to minimise the incidence of forged electronic records, intentional and unintentional alteration of records, and fraud in electronic commerce and other electronic transactions;
- (e) to help to establish uniformity of rules, regulations and standards regarding the authentication and integrity of electronic records; and

(f) to promote public confidence in the integrity and reliability of electronic records and electronic commerce, and to foster the development of electronic commerce through the use of electronic signatures to lend authenticity and integrity to correspondence in any electronic medium.

Application

4. --(1) Parts II and IV shall not apply to any rule of law requiring writing or signatures in any of the following matters:

- (a) the creation or execution of a will;
- (b) negotiable instruments;
- (c) the creation, performance or enforcement of an indenture, declaration of trust or power of attorney with the exception of constructive and resulting trusts;
- (d) any contract for the sale or other disposition of immovable property, or any interest in such property;
- (e) the conveyance of immovable property or the transfer of any interest in immovable property;
- (f) documents of title.

(2) The Minister may by order modify the provisions of subsection (1) by adding, deleting or amending any class of transactions or matters.

Variation by agreement

5. As between parties involved in generating, sending, receiving, storing or otherwise processing electronic records, any provision of Part II or IV may be varied by agreement.

PART II ELECTRONIC RECORDS AND SIGNATURES GENERALLY

Legal recognition of electronic records

6. For the avoidance of doubt, it is declared that information shall not be denied legal

effect, validity or enforceability solely on the ground that it is in the form of an electronic record.

Requirement for writing

7. Where a rule of law requires information to be written, in writing, to be presented in writing or provides for certain consequences if it is not, an electronic record satisfies that rule of law if the information contained therein is accessible so as to be usable for subsequent reference.

Electronic signatures

8. --(1) Where a rule of law requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law.

(2) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a party, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of such party.

Retention of electronic records

9. --(1) Where a rule of law requires that certain documents, records or information be retained, that requirement is satisfied by retaining them in the form of electronic records if the following conditions are satisfied:

(a) the information contained therein remains accessible so as to be usable for subsequent reference;

(b) the electronic record is retained in the format in which it was originally generated, sent or received, or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;

(c) such information, if any, as enables the identification of the origin and destination of an electronic record and the date and time when it was sent or received, is retained; and

(d) the consent of the department or ministry of the Government, organ of State or the statutory corporation which has supervision over the requirement for the retention of such records has been obtained.

(2) An obligation to retain documents, records or information in accordance with subsection (1) (c) shall not extend to any information necessarily and automatically generated solely for the purpose of enabling a record to be sent or received.

(3) A person may satisfy the requirement referred to in subsection (1) by using the services of any other person, if the conditions in paragraphs (a) to (d) of that subsection are complied with.

(4) Nothing in this section shall —

(a) apply to any rule of law which expressly provides for the retention of documents, records or information in the form of electronic records; or

(b) preclude any department or ministry of the Government, organ of State or a statutory corporation from specifying additional requirements for the retention of electronic records that are subject to the jurisdiction of such department or ministry of the Government, organ of State or statutory corporation.

PART III LIABILITY OF NETWORK SERVICE PROVIDERS

Liability of network service providers

10. --(1) A network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on

(a) the making, publication, dissemination or distribution of such materials or any statement made in such material; or

(b) the infringement of any rights subsisting in or in relation to such material.

(2) Nothing in this section shall affect —

(a) any obligation founded on contract;

(b) the obligation of a network service provider as such under a licensing or other

regulatory regime established under any written law; or

(c) any obligation imposed under any written law or by a court to remove, block or deny access to any material.

(3) For the purposes of this section —

"provides access" , in relation to third-party material, means the provision of the necessary technical means by which third-party material may be accessed and includes the automatic and temporary storage of the third-party material for the purpose of providing access;

"third-party" , in relation to a network service provider, means a person over whom the provider has no effective control.

PART IV ELECTRONIC CONTRACTS

Formation and validity of contracts

11. --(1) For the avoidance of doubt, it is declared that in the context of the formation of contracts, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of electronic records.

(2) Where an electronic record is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that an electronic record was used for that purpose.

Effectiveness between parties

12. As between the originator and the addressee of an electronic record, a declaration of intent or other statement shall not be denied legal effect, validity or enforceability solely on the ground that it is in the form of an electronic record.

Attribution

13. --(1) An electronic record is that of the originator if it was sent by the originator

himself.

(2) As between the originator and the addressee, an electronic record is deemed to be that of the originator if it was sent —

(a) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or

(b) by an information system programmed by or on behalf of the originator to operate automatically.

(3) As between the originator and the addressee, an addressee is entitled to regard an electronic record as being that of the originator and to act on that assumption if —

(a) in order to ascertain whether the electronic record was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or

(b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify electronic records as its own.

(4) Subsection (3) shall not apply —

(a) from the time when the addressee has both received notice from the originator that the electronic record is not that of the originator, and had reasonable time to act accordingly;

(b) in a case within subsection (3) (b) , at any time when the addressee knew or ought to have known, had it exercised reasonable care or used any agreed procedure, that the electronic record was not that of the originator; or

(c) if, in all the circumstances of the case, it is unconscionable for the addressee to regard the electronic record as being that of the originator or to act on that assumption.

(5) Where an electronic record is that of the originator or is deemed to be that of the originator, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the electronic record

received as being what the originator intended to send, and to act on that assumption.

(6) The addressee is not so entitled when the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the electronic record as received.

(7) The addressee is entitled to regard each electronic record received as a separate electronic record and to act on that assumption, except to the extent that the addressee duplicates another electronic record and the addressee knew or should have known, had the addressee exercised reasonable care or used any agreed procedure, that the electronic record was a duplicate.

(8) Nothing in this section shall affect the law of agency or the law on the formation of contracts.

Acknowledgment of receipt

14. --(1) Subsections (2), (3) and (4) shall apply where, on or before sending an electronic record, or by means of that electronic record, the originator has requested or has agreed with the addressee that receipt of the electronic record be acknowledged.

(2) Where the originator has not agreed with the addressee that the acknowledgment be given in a particular form or by a particular method, an acknowledgment may be given by —

(a) any communication by the addressee, automated or otherwise; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

(3) Where the originator has stated that the electronic record is conditional on receipt of the acknowledgment, the electronic record is treated as though it had never been sent, until the acknowledgment is received.

(4) Where the originator has not stated that the electronic record is conditional on receipt of the acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or

agreed within a reasonable time, the originator —

(a) may give notice to the addressee stating that no acknowledgment has been received and specifying a reasonable time by which the acknowledgment must be received; and

(b) if the acknowledgment is not received within the time specified in paragraph (a), may, upon notice to the addressee, treat the electronic record as though it has never been sent or exercise any other rights it may have.

(5) Where the originator receives the addressee's acknowledgment of receipt, it is presumed, unless evidence to the contrary is adduced, that the related electronic record was received by the addressee, but that presumption does not imply that the content of the electronic record corresponds to the content of the record received.

(6) Where the received acknowledgment states that the related electronic record met technical requirements, either agreed upon or set forth in applicable standards, it is presumed, unless evidence to the contrary is adduced, that those requirements have been met.

(7) Except in so far as it relates to the sending or receipt of the electronic record, this Part is not intended to deal with the legal consequences that may flow either from that electronic record or from the acknowledgment of its receipt.

Time and place of despatch and receipt

15. --(1) Unless otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters an information system outside the control of the originator or the person who sent the electronic record on behalf of the originator.

(2) Unless otherwise agreed to between the originator and the addressee, the time of receipt of an electronic record is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving electronic records, receipt occurs —

(i) at the time when the electronic record enters the designated information system; or

- (ii) if the electronic record is sent to an information system of the addressee that is not the designated information system, at the time when the electronic record is retrieved by the addressee; or
- (b) if the addressee has not designated an information system, receipt occurs when the electronic record enters an information system of the addressee.
- (3) Subsection (2) shall apply notwithstanding that the place where the information system is located may be different from the place where the electronic record is deemed to be received under subsection (4).
- (4) Unless otherwise agreed to between the originator and the addressee, an electronic record is deemed to be despatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business.
- (5) For the purposes of this section —
 - (a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;
 - (b) if the originator or the addressee does not have a place of business, reference is to be made to the usual place of residence; and
 - (c) “usual place of residence”, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.
- (6) This section shall not apply to such circumstances as the Minister may by regulations prescribe.

PART V

SECURE ELECTRONIC RECORDS AND SIGNATURES

Secure electronic record

16. --(1) If a prescribed security procedure or a commercially reasonable security procedure agreed to by the parties involved has been properly applied to an electronic record to verify that the electronic record has not been altered since a specific point in

time, such record shall be treated as a secure electronic record from such specific point in time to the time of verification.

(2) For the purposes of this section and section 17, whether a security procedure is commercially reasonable shall be determined having regard to the purposes of the procedure and the commercial circumstances at the time the procedure was used, including —

- (a) the nature of the transaction;
- (b) the sophistication of the parties;
- (c) the volume of similar transactions engaged in by either or all parties;
- (d) the availability of alternatives offered to but rejected by any party;
- (e) the cost of alternative procedures; and
- (f) the procedures in general use for similar types of transactions.

Secure electronic signature

17. If, through the application of a prescribed security procedure or a commercially reasonable security procedure agreed to by the parties involved, it can be verified that an electronic signature was, at the time it was made —

- (a) unique to the person using it;
 - (b) capable of identifying such person;
 - (c) created in a manner or using a means under the sole control of the person using it; and
 - (d) linked to the electronic record to which it relates in a manner such that if the record was changed the electronic signature would be invalidated,
- such signature shall be treated as a secure electronic signature.

Presumptions relating to secure electronic records and signatures

18. --(1) In any proceedings involving a secure electronic record, it shall be presumed, unless evidence to the contrary is adduced, that the secure electronic record has not been altered since the specific point in time to which the secure status relates.

(2) In any proceedings involving a secure electronic signature, it shall be presumed,

unless evidence to the contrary is adduced, that —

(a) the secure electronic signature is the signature of the person to whom it correlates;
and

(b) the secure electronic signature was affixed by that person with the intention of signing or approving the electronic record.

(3) In the absence of a secure electronic record or a secure electronic signature, nothing in this Part shall create any presumption relating to the authenticity and integrity of the electronic record or electronic signature.

(4) For the purposes of this section —

"secure electronic record" means an electronic record treated as a secure electronic record by virtue of section 16 or 19;

"secure electronic signature" means an electronic signature treated as a secure electronic signature by virtue of section 17 or 20.

PART VI EFFECT OF DIGITAL SIGNATURES

Secure electronic record with digital signature

19. The portion of an electronic record that is signed with a digital signature shall be treated as a secure electronic record if the digital signature is a secure electronic signature by virtue of section 20.

Secure digital signature

20. When any portion of an electronic record is signed with a digital signature, the digital signature shall be treated as a secure electronic signature with respect to such portion of the record, if —

(a) the digital signature was created during the operational period of a valid certificate and is verified by reference to the public key listed in such certificate; and

(b) the certificate is considered trustworthy, in that it is an accurate binding of a public key to a person's identity because —

- (i) the certificate was issued by a licensed certification authority operating in compliance with the regulations made under section 42 ;
 - (ii) the certificate was issued by a certification authority outside Singapore recognised for this purpose by the Controller pursuant to regulations made under section 43;
 - (iii) the certificate was issued by a department or ministry of the Government, an organ of State or a statutory corporation approved by the Minister to act as a certification authority on such conditions as he may by regulations impose or specify;
- or
- (iv) the parties have expressly agreed between themselves (sender and recipient) to use digital signatures as a security procedure, and the digital signature was properly verified by reference to the sender's public key.

Presumptions regarding certificates

21. It shall be presumed, unless evidence to the contrary is adduced, that the information (except for information identified as subscriber information which has not been verified) listed in a certificate issued by a licensed certification authority is correct if the certificate was accepted by the subscriber.

Unreliable digital signatures

22. Unless otherwise provided by law or contract, a person relying on a digitally signed electronic record assumes the risk that the digital signature is invalid as a signature or authentication of the signed electronic record, if reliance on the digital signature is not reasonable under the circumstances having regard to the following factors:

- (a) facts which the person relying on the digitally signed electronic record knows or has notice of, including all facts listed in the certificate or incorporated in it by reference;
- (b) the value or importance of the digitally signed electronic record, if known;
- (c) the course of dealing between the person relying on the digitally signed electronic record and the subscriber and any available indicia of reliability or unreliability apart

from the digital signature; and

(d) any usage of trade, particularly trade conducted by trustworthy systems or other electronic means.

PART VII GENERAL DUTIES RELATING TO DIGITAL SIGNATURES

Reliance on certificates foreseeable

23. It is foreseeable that persons relying on a digital signature will also rely on a valid certificate containing the public key by which the digital signature can be verified.

Prerequisites to publication of certificate

24. No person may publish a certificate or otherwise make it available to a person known by that person to be in a position to rely on the certificate or on a digital signature that is verifiable with reference to a public key listed in the certificate, if that person knows that —

- (a) the certification authority listed in the certificate has not issued it;
- (b) the subscriber listed in the certificate has not accepted it; or
- (c) the certificate has been suspended or revoked, unless such publication is for the purpose of verifying a digital signature created prior to such suspension or revocation.

Publication for fraudulent or unlawful purpose

25. Any person who knowingly creates, publishes or otherwise makes available a certificate for any fraudulent or unlawful purpose shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 2 years or to both.

False or unauthorised request

26. Any person who knowingly misrepresents to a certification authority his identity or authorisation for the purpose of requesting for a certificate or for suspension or

revocation of a certificate shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 6 months or to both.

PART VIII DUTIES OF CERTIFICATION AUTHORITIES

Trustworthy system

27. A certification authority must utilise trustworthy systems in performing its services.

Disclosure

28. --(1) A certification authority shall disclose —

(a) its certificate that contains the public key corresponding to the private key used by that certification authority to digitally sign another certificate (referred to in this section as a certification authority certificate);

(b) any relevant certification practice statement;

(c) notice of the revocation or suspension of its certification authority certificate; and

(d) any other fact that materially and adversely affects either the reliability of a certificate that the authority has issued or the authority's ability to perform its services.

(2) In the event of an occurrence that materially and adversely affects a certification authority's trustworthy system or its certification authority certificate, the certification authority shall —

(a) use reasonable efforts to notify any person who is known to be or foreseeably will be affected by that occurrence; or

(b) act in accordance with procedures governing such an occurrence specified in its certification practice statement.

Issue of certificate

29. --(1) A certification authority may issue a certificate to a prospective subscriber only after the certification authority —

- (a) has received a request for issuance from the prospective subscriber; and
- (b) has —
 - (i) if it has a certification practice statement, complied with all of the practices and procedures set forth in such certification practice statement including procedures regarding identification of the prospective subscriber; or
 - (ii) in the absence of a certification practice statement, complied with the conditions in subsection (2).

(2) In the absence of a certification practice statement, the certification authority shall confirm by itself or through an authorised agent that —

- (a) the prospective subscriber is the person to be listed in the certificate to be issued;
- (b) if the prospective subscriber is acting through one or more agents, the subscriber authorised the agent to have custody of the subscriber's private key and to request issuance of a certificate listing the corresponding public key;
- (c) the information in the certificate to be issued is accurate;
- (d) the prospective subscriber rightfully holds the private key corresponding to the public key to be listed in the certificate;
- (e) the prospective subscriber holds a private key capable of creating a digital signature; and
- (f) the public key to be listed in the certificate can be used to verify a digital signature affixed by the private key held by the prospective subscriber.

Representations upon issuance of certificate

30. --(1) By issuing a certificate, a certification authority represents to any person who reasonably relies on the certificate or a digital signature verifiable by the public key listed in the certificate that the certification authority has issued the certificate in accordance with any applicable certification practice statement incorporated by reference in the certificate, or of which the relying person has notice.

(2) In the absence of such certification practice statement, the certification authority represents that it has confirmed that —

(a) the certification authority has complied with all applicable requirements of this Act in issuing the certificate, and if the certification authority has published the certificate or otherwise made it available to such relying person, that the subscriber listed in the certificate has accepted it;

(b) the subscriber identified in the certificate holds the private key corresponding to the public key listed in the certificate;

(c) the subscriber's public key and private key constitute a functioning key pair;

(d) all information in the certificate is accurate, unless the certification authority has stated in the certificate or incorporated by reference in the certificate a statement that the accuracy of specified information is not confirmed; and

(e) the certification authority has no knowledge of any material fact which if it had been included in the certificate would adversely affect the reliability of the representations in paragraphs (a) to (d).

(3) Where there is an applicable certification practice statement which has been incorporated by reference in the certificate, or of which the relying person has notice, subsection (2) shall apply to the extent that the representations are not inconsistent with the certification practice statement.

Suspension of certificate

31. Unless the certification authority and the subscriber agree otherwise, the certification authority that issued a certificate shall suspend the certificate as soon as possible after receiving a request by a person whom the certification authority reasonably believes to be —

(a) the subscriber listed in the certificate;

(b) a person duly authorised to act for that subscriber; or

(c) a person acting on behalf of that subscriber, who is unavailable.

Revocation of certificate

32. A certification authority shall revoke a certificate that it issued —

- (a) after receiving a request for revocation by the subscriber named in the certificate; and confirming that the person requesting the revocation is the subscriber, or is an agent of the subscriber with authority to request the revocation;
- (b) after receiving a certified copy of the subscriber's death certificate, or upon confirming by other evidence that the subscriber is dead; or
- (c) upon presentation of documents effecting a dissolution of the subscriber, or upon confirming by other evidence that the subscriber has been dissolved or has ceased to exist.

Revocation without subscriber's consent

33. --(1) A certification authority shall revoke a certificate, regardless of whether the subscriber listed in the certificate consents, if the certification authority confirms that
- (a) a material fact represented in the certificate is false;
 - (b) a requirement for issuance of the certificate was not satisfied;
 - (c) the certification authority's private key or trustworthy system was compromised in a manner materially affecting the certificate's reliability;
 - (d) an individual subscriber is dead; or
 - (e) a subscriber has been dissolved, wound-up or otherwise ceased to exist.
- (2) Upon effecting such a revocation, other than under subsection (1) (d) or (e), the certification authority shall immediately notify the subscriber listed in the revoked certificate.

Notice of suspension

34. --(1) Immediately upon suspension of a certificate by a certification authority, the certification authority shall publish a signed notice of the suspension in the repository specified in the certificate for publication of notice of suspension.
- (2) Where one or more repositories are specified, the certification authority shall publish signed notices of the suspension in all such repositories.

Notice of revocation

35. --(1) Immediately upon revocation of a certificate by a certification authority, the certification authority shall publish a signed notice of the revocation in the repository specified in the certificate for publication of notice of revocation.
- (2) Where one or more repositories are specified, the certification authority shall publish signed notices of the revocation in all such repositories.

PART IX DUTIES OF SUBSCRIBERS

Generating key pair

36. --(1) If the subscriber generates the key pair whose public key is to be listed in a certificate issued by a certification authority and accepted by the subscriber, the subscriber shall generate that key pair using a trustworthy system.
- (2) This section shall not apply to a subscriber who generates the key pair using a system approved by the certification authority.

Obtaining certificate.

37. All material representations made by the subscriber to a certification authority for purposes of obtaining a certificate, including all information known to the subscriber and represented in the certificate, shall be accurate and complete to the best of the subscriber's knowledge and belief, regardless of whether such representations are confirmed by the certification authority.

Acceptance of certificate

38. --(1) A subscriber shall be deemed to have accepted a certificate if he —
- (a) publishes or authorises the publication of a certificate —
 - (i) to one or more persons; or
 - (ii) in a repository; or
 - (b) otherwise demonstrates approval of a certificate while knowing or having notice

of its contents.

(2) By accepting a certificate issued by himself or a certification authority, the subscriber listed in the certificate certifies to all who reasonably rely on the information contained in the certificate that —

(a) the subscriber rightfully holds the private key corresponding to the public key listed in the certificate;

(b) all representations made by the subscriber to the certification authority and material to the information listed in the certificate are true; and

(c) all information in the certificate that is within the knowledge of the subscriber is true.

Control of private key

39. --(1) By accepting a certificate issued by a certification authority, the subscriber identified in the certificate assumes a duty to exercise reasonable care to retain control of the private key corresponding to the public key listed in such certificate and prevent its disclosure to a person not authorised to create the subscriber's digital signature.

(2) Such duty shall continue during the operational period of the certificate and during any period of suspension of the certificate.

Initiating suspension or revocation of certificate

40. A subscriber who has accepted a certificate shall as soon as possible request the issuing certification authority to suspend or revoke the certificate if the private key corresponding to the public key listed in the certificate has been compromised.

PART X REGULATION OF CERTIFICATION AUTHORITIES

Appointment of Controller and other officers

41. --(1) The Minister shall appoint a Controller of Certification Authorities for the

purposes of this Act and, in particular, for the purposes of licensing, certifying, monitoring and overseeing the activities of certification authorities.

(2) The Controller may, after consultation with the Minister, appoint such number of Deputy and Assistant Controllers of Certification Authorities and officers as the Controller considers necessary to exercise and perform all or any of the powers and duties of the Controller under this Act or any regulations made thereunder.

(3) The Controller, the Deputy and Assistant Controllers and officers appointed by the Controller under subsection (2) shall exercise, discharge and perform the powers, duties and functions conferred on the Controller under this Act or any regulations made thereunder subject to such directions as may be issued by the Minister.

(4) The Controller shall maintain a publicly accessible database containing a certification authority disclosure record for each licensed certification authority which shall contain all the particulars required under the regulations made under this Act.

(5) In the application of the provisions of this Act to certificates issued by the Controller and digital signatures verified by reference to those certificates, the Controller shall be deemed to be a licensed certification authority.

Regulation of certification authorities

42. --(1) The Minister may make regulations for the regulation and licensing of certification authorities and to define when a digital signature qualifies as a secure electronic signature.

(2) Without prejudice to the generality of subsection (1), the Minister may make regulations for or with respect to —

(a) applications for licences or renewal of licences of certification authorities and their authorised representatives and matters incidental thereto;

(b) the activities of certification authorities including the manner, method and place of soliciting business, the conduct of such solicitation and the prohibition of such solicitation of members of the public by certification authorities which are not licensed;

- (c) the standards to be maintained by certification authorities;
 - (d) prescribing the appropriate standards with respect to the qualifications, experience and training of applicants for any licence or their employees;
 - (e) prescribing the conditions for the conduct of business by a certification authority;
 - (f) providing for the content and distribution of written, printed or visual material and advertisements that may be distributed or used by a person in respect of a digital certificate or key;
 - (g) prescribing the form and content of a digital certificate or key;
 - (h) prescribing the particulars to be recorded in, or in respect of, accounts kept by certification authorities;
 - (i) providing for the appointment and remuneration of an auditor appointed under the regulations and for the costs of an audit carried out under the regulations;
 - (j) providing for the establishment and regulation of any electronic system by a certification authority, whether by itself or in conjunction with other certification authorities, and for the imposition and variation of such requirements, conditions or restrictions as the Controller may think fit;
 - (k) the manner in which a holder of a licence conducts its dealings with its customers, conflicts of interest involving the holder of a licence and its customers, and the duties of a holder of a licence to its customers with respect to digital certificates;
 - (l) prescribing forms for the purposes of the regulations; and
 - (m) prescribing fees to be paid in respect of any matter or thing required for the purposes of this Act or the regulations.
- (3) Regulations made under this section may provide that a contravention of a specified provision shall be an offence and may provide penalties not exceeding a fine of \$50,000 or imprisonment for a term not exceeding 12 months or both.

Recognition of foreign certification authorities

43. The Minister may, by regulations, provide that the Controller may recognise certification authorities outside Singapore that satisfy the prescribed requirements for

any of the following purposes:

- (a) the recommended reliance limit, if any, specified in a certificate issued by the certification authority;
- (b) the presumptions referred to in sections 20 (b) (ii) and 21.

Recommended reliance limit

44. --(1) A licensed certification authority shall, in issuing a certificate to a subscriber, specify a recommended reliance limit in the certificate.
- (2) The licensed certification authority may specify different reliance limits in different certificates as it considers fit.

Liability limits for licensed certification authorities

45. Unless a licensed certification authority waives the application of this section, a licensed certification authority shall not be liable —
- (a) for any loss caused by reliance on a false or forged digital signature of a subscriber, if, with respect to the false or forged digital signature, the licensed certification authority complied with the requirements of this Act; or
 - (b) in excess of the amount specified in the certificate as its recommended reliance limit for either —
 - (i) a loss caused by reliance on a misrepresentation in the certificate of any fact that the licensed certification authority is required to confirm; or
 - (ii) failure to comply with sections 29 and 30 in issuing the certificate.

Regulation of repositories

46. The Minister may make regulations for the purpose of ensuring the quality of repositories and the services they provide including provisions for the standards, licensing or accreditation of repositories.

PART XI
GOVERNMENT USE OF ELECTRONIC RECORDS AND
SIGNATURES

Acceptance of electronic filing and issue of documents

47. --(1) Any department or ministry of the Government, organ of State or statutory corporation that, pursuant to any written law —

(a) accepts the filing of documents, or requires that documents be created or retained;

(b) issues any permit, licence or approval; or

(c) provides for the method and manner of payment,

may, notwithstanding anything to the contrary in such written law —

(i) accept the filing of such documents, or the creation or retention of such documents in the form of electronic records;

(ii) issue such permit, licence or approval in the form of electronic records; or

(iii) make such payment in electronic form.

(2) In any case where a department or ministry of the Government, organ of State or statutory corporation decides to perform any of the functions in subsection (1) (i), (ii) or (iii), such agency may specify —

(a) the manner and format in which such electronic records shall be filed, created, retained or issued;

(b) where such electronic records have to be signed, the type of electronic signature required (including, if applicable, a requirement that the sender use a digital signature or other secure electronic signature);

(c) the manner and format in which such signature shall be affixed to the electronic record, and the identity of or criteria that shall be met by any certification authority used by the person filing the document;

(d) control processes and procedures as appropriate to ensure adequate integrity, security and confidentiality of electronic records or payments; and

(e) any other required attributes for electronic records or payments that are currently specified for corresponding paper documents.

(3) Nothing in this Act shall by itself compel any department or ministry of the Government, organ of State or statutory corporation to accept or issue any document in the form of electronic records.

PART XII GENERAL

Obligation of confidentiality

48. --(1) Except for the purposes of this Act or for any prosecution for an offence under any written law or pursuant to an order of court, no person who has, pursuant to any powers conferred under this Part, obtained access to any electronic record, book, register, correspondence, information, document or other material shall disclose such electronic record, book, register, correspondence, information, document or other material to any other person.

(2) Any person who contravenes subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$10,000 or to imprisonment for a term not exceeding 12 months or to both.

Offence by body corporate

49. Where an offence under this Act or any regulations made there under is committed by a body corporate, and it is proved to have been committed with the consent or connivance of, or to be attributable to any act or default on the part of, any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Authorised officer

50. --(1) The Controller may in writing authorise any officer or employee to exercise any of the powers of the Controller under this Part.

(2) The Controller and any such officer shall be deemed to be a public servant for the purposes of the Penal Code (Cap. 224).

(3) In exercising any of the powers of enforcement under this Act, an authorised officer shall on demand produce to the person against whom he is acting the authority issued to him by the Controller.

Controller may give directions for compliance

51. --(1) The Controller may, by notice in writing, direct a certification authority or any officer or employee thereof to take such measures or stop carrying on such activities as are specified in the notice if they are necessary to ensure compliance with the provisions of this Act or any regulations made there under.

(2) Any person who fails to comply with any direction specified in a notice issued under subsection (1) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$50,000 or to imprisonment for a term not exceeding 12 months or to both.

Power to investigate

52. --(1) The Controller or an authorised officer may investigate the activities of a certification authority in relation to its compliance with this Act and any regulations made there under.

(2) For the purposes of subsection (1), the Controller may in writing issue an order to a certification authority to further its investigation or to secure compliance with this Act or any regulations made there under.

Access to computers and data

53. --(1) The Controller or an authorised officer shall be entitled at any time to —

(a) have access to and inspect and check the operation of any computer system and any associated apparatus or material which he has reasonable cause to suspect is or has been in use in connection with any offence under this Act; and

(b) use or caused to be used any such computer system to search any data contained in or available to such computer system.

- (2) The Controller or an authorised officer shall be entitled to require —
- (a) the person by whom or on whose behalf the Controller or authorised officer has reasonable cause to suspect the computer is or has been so used; or
 - (b) any person having charge of, or otherwise concerned with the operation of, the computer, apparatus or material,
- to provide him with such reasonable technical and other assistance as he may require for the purposes of subsection (1).
- (3) Any person who —
- (a) obstructs the lawful exercise of the powers under subsection (1); or
 - (b) fails to comply with a request under subsection (2),
- shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 12 months or to both.

Obstruction of Controller or authorised officer

54. Any person who obstructs, impedes, assaults or interferes with the Controller or any authorised officer in the performance of his functions under this Act shall be guilty of an offence.

Production of documents, data, etc.

55. The Controller or an authorised officer shall, for the purposes of the execution of this Act, have power to do all or any of the following:

- (a) require the production of records, accounts, data and documents kept by a licensed certification authority and to inspect, examine and copy any of them;
- (b) require the production of any identification document from any person in relation to any offence under this Act or any regulations made thereunder;
- (c) make such inquiry as may be necessary to ascertain whether the provisions of this Act or any regulations made there under have been complied with.

General penalties

56. Any person guilty of an offence under this Act or any regulations made thereunder

for which no penalty is expressly provided shall be liable on conviction to a fine not exceeding \$20,000 or to imprisonment for a term not exceeding 6 months or to both.

Sanction of Public Prosecutor

57. No prosecution in respect of any offence under this Act or any regulations made there under shall be instituted except by or with the sanction of the Public Prosecutor.

Jurisdiction of Courts

58. A District Court or a Magistrate's Court shall have jurisdiction to hear and determine all offences under this Act and any regulations made there under and, notwithstanding anything to the contrary in the Criminal Procedure Code (Cap. 68), shall have power to impose the full penalty or punishment in respect of any offence under this Act or any regulations made thereunder.

Composition of offences

59. --(1) The Controller may, in his discretion, compound any offence under this Act or any regulations made there under which is prescribed as being an offence which may be compounded by collecting from the person reasonably suspected of having committed the offence a sum not exceeding \$5,000.

(2) The Minister may make regulations prescribing the offences which may be compounded.

Power to exempt

60. The Minister may exempt, subject to such terms and conditions as he thinks fit, any person or class of persons from all or any of the provisions of this Act or any regulations made thereunder.

Regulations

61. The Minister may make regulations to prescribe anything which is required to be prescribed under this Act and generally for the carrying out of the provisions of this Act.

ภาคผนวก ก

Law Concerning the Limits of Liability for Damages of Specified Telecommunications
Service Providers and the Right to
Request Disclosure of Identification Information of the Senders
(Law No. 137 of November 30, 2001)
Ministry of Internal Affairs and Communications, Japan

Law Concerning the Limits of Liability for Damages of Specified
Telecommunications Service Providers and the Right to Request Disclosure of
Identification Information of the Senders

This English translation of the “Law Concerning the Limits of Liability for
Damages of Specified Telecommunications Service Providers and the Right to Request
Disclosure of Identification Information of the Senders” has been translated in
compliance with the Standard Bilingual

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the Official Gazette. Law Concerning the Limits of Liability for Damages of Specified
Telecommunications Service Providers and the Right to Request Disclosure of
Identification Information of the Senders

(Purpose)

Article 1.

The purpose of this Law is to set forth the limits of liability for damages of specified telecommunications service providers and the right to request disclosure of identification information of the senders in case of violation of the rights through information distribution by specified telecommunications services.

(Definitions)

Article 2.

In this Law, with respect to the meanings of the terms given in the following items, the definition specified in each item shall apply:

i) The term "specified telecommunications service" means transmission (except transmission of telecommunications with the aim of direct reception thereof by the public) of telecommunications (referring to "telecommunications" as defined in Article 2 item i) of the Telecommunications Business Law (Law No. 86 of December 25, 1984)) with the aim of reception thereof by unspecified persons.

ii) The term "specified telecommunications facilities" means telecommunications facilities (referring to "telecommunications facilities" as defined in Article 2 item ii) of the Telecommunications Business Law) being used for the operation of specified telecommunications.

iii) The term "specified telecommunications service provider" means a person who relays others' communications with the use of specified telecommunications facilities, or provides specified telecommunications facilities to be used for others' communications.

iv) The term "sender" means a person who has recorded information in recording media (limited to such recording media, from which the information recorded therein is to be transmitted to unspecified persons) of specified telecommunications facilities used by a specified telecommunications service provider, or who has input information in the transmission device (limited to such a transmission device, from which

the information input therein is to be transmitted to unspecified persons) of such specified telecommunications facilities.

(Limits of Liability for Damages)

Article 3.

(1) When any right of others is violated by information distribution via specified telecommunications, the specified telecommunications service provider who uses specified telecommunications facilities for said specified telecommunications (hereinafter in this paragraph referred to as a "relevant service provider") shall not be liable for any loss incurred from such violation, unless where it is technically possible to take measures for preventing such information from being transmitted to unspecified persons and such event of violation falls under any of the following items. However, where said relevant service provider is the sender of said information Law Concerning the Limits of Liability for Damages of Specified Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Senders violating rights, this shall not apply.

i) In cases where said relevant service provider knew that the violation of the rights of others was caused by information distribution via said specified telecommunications

ii) In cases where said relevant service provider had knowledge of information distribution by said specified telecommunications, and where there is a reasonable ground to find that said relevant service provider could know the violation of the rights of others was caused by the information distribution via said specified telecommunications

(2) When a specified telecommunications service provider has taken measures to block transmission of information via specified telecommunications, said specified telecommunications service provider shall not be liable for any loss incurred by a sender of such information, transmission of which is prevented by said measures, so far as said measures have been taken within the limit necessary for preventing transmission

of said information to unspecified persons and said measures fall under any of the following items:

i) In cases where there was a reasonable ground for said specified telecommunications service provider to believe that the rights of others were violated without due cause by the information distribution via said specified telecommunications

ii) In cases where a person alleging that his right was violated by distribution of information via a specified telecommunications filed a petition that said specified telecommunications service provider take measures to prevent said information violating his right (hereinafter referred to as "violating information") from being transmitted (hereinafter in this item referred to as "transmission prevention measures"), indicating the violating information and the allegedly violated right and the reason why said person insists on said violation

(herein after in this item referred to as "violating information, etc.") and where said specified telecommunications service provider provided such violating information, etc. to the sender of said violating information and inquired the sender if said sender agrees with implementing said transmission prevention measures, where said specified telecommunications service provider has not received any notice from said sender indicating his disagreement with implementation of said transmission prevention measures after seven days from the day of said inquiry to said sender

(Request for Disclosure of Identification Information of the Sender, Etc.)

Article 4.

(1) Any person alleging that his or her rights were violated by distribution of information via specified telecommunications may, limited to cases when falling under both of the following items, request a specified telecommunications service provider using specified telecommunications facilities for the operations of said specified telecommunications (hereinafter referred to as a "provider of disclosure-related service") to disclose identification information of the sender pertaining to said violation

of the rights (referring to information, including a name and address, contributing to identifying the sender of the violating information and which is as stipulated in the applicable MIC ordinance; hereinafter the same shall apply.) possessed by said provider of Law Concerning the Limits of Liability for Damages of Specified Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Senders disclosure-related service:

i) Where there is evidence that the rights of a person requesting said disclosure were violated
by the distribution of the violating information

ii) Where said identification information of the sender is necessary for the person requesting said disclosure to exercise his or her rights to claim damages and where there is justifiable ground for said person to receive disclosed identification information of the sender

(2) When the provider of disclosure-related service receives such demand as stipulated in the preceding paragraph, said provider shall hear the opinion of the sender of the violating information pertaining to said request for disclosure on whether said sender consents to the disclosure of his or her identification information, except where said provider is unable to contact said sender or where there are special circumstances.

(3) Any person who received disclosed identification information of the sender in accordance with the provisions of paragraph (1) shall not, by indiscriminately using said identification information, unduly commit any act defaming said sender or disturbing tranquility of life.

(4) The provider of disclosure-related service shall not be liable for any loss incurred by the person who requested for said disclosure in accordance with the provisions of paragraph (1) arising from said provider's refusal of said request, unless there is any willful or gross negligence on the part of said provider. However, where said provider of disclosure-related service is the sender of violating information pertaining to said request for disclosure, this shall not apply. Law Concerning the Limits of Liability for

Damages of Specified Telecommunications Service Providers and the Right to Request Disclosure of Identification Information of the Senders