

Testimony of  
**The Honorable Patrick Leahy**

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When I first arrived in the Senate television broadcasts were no longer just in black and white and record players had high-fidelity and stereophonic sound. The personal computer, email, high-definition television, CDs, DVDs, wireless communications devices and the Internet were yet to be created. Now these are among the ubiquitous tools we use today to do our work, talk to friends and family, listen to music, watch a movie, or play a video game. Each new tool has spawned new opportunities, entirely new industries, new ways to package and sell products, and new ways for consumers to enjoy copyrighted works. It is no surprise that the intellectual property generated in this country is an economic engine that is the envy of the world.

**Challenge of New Technologies.** The challenge of protecting music, motion pictures, sound recordings, computer software and other copyrighted works in digital formats has been the focus of the Judiciary Committee's sustained attention over the past few Congresses. I have worked in partnership with Senator Hatch, and other Members of this Committee, to keep our copyright laws up to date to protect the rights of creators and ensure that consumers enjoy a vast selection of new and different educational, entertainment and other copyrighted products.

We appreciate, having focused on these issues for so long, that new technological developments pose new challenges about how to protect copyrighted works and create new business models to deliver those products to consumers securely, cost-effectively, and conveniently. New technologies may initially appear to trump intellectual property protection, but in the end they open new opportunities for artists and new choices for consumers. Protecting intellectual property, which has been within the jurisdiction of this Committee since its establishment in 1816, involves far more than arcane legal issues and requires a careful balance among the rights and interests of consumers, creators, and innovators.

**DMCA.** We were well aware of these new challenges in 1998, when I worked closely with Senator Hatch on the Digital Millennium Copyright Act, "DMCA," to advance the complementary goals of protecting digital copyrighted works and promoting the development of innovative technologies. At the time, this new law was praised by Jack Valenti of the Motion Picture Association of America as "offering intellectual property the full weaponry of the law to protect its voyages in cyberspace from thieves who have previously determined that stealing creative works is very rewarding and very low risk." (Testimony before the Senate Foreign Relations Committee, September 10, 1998). A core provision of the DMCA barred the unauthorized circumvention of "technological measures" used effectively by content owners to prevent unauthorized access to copyrighted works. The new law left to the private sector the important decisions of what technological protection measures to develop and use to protect digital works - or whether to use any protection measure at all.

DRM Progress. Technology has been the bane of content owners, who are rightfully dismayed at the rampant online piracy of valuable works, but it is also pivotal to their protection. Since passage of the DMCA, great progress has been made to develop diverse technical tools to protect and manage digital rights in various media. Multi-industry groups, involving technology companies, consumer electronics companies, movie studios and other content owners, have developed technologies to protect digital content delivered to consumers on DVD and CD, over satellite, cable and broadband systems, and over the Internet.

Content owners are using these new digital rights management tools to develop and experiment with new business models for delivery of content to consumers. Just in the past few months, new sites like Pressplay and Musicnet have offered legitimate sources for Internet users and music lovers to access music online - all protected by digital rights management technology that has been chosen and suits the needs of the owners. We will also see today Jonathan Taplin's Web site for consumers to enjoy video-on-demand, also protected by digital rights management tools that fit his business model and protect the movies from unauthorized copying.

DRM Gaps. This is not a perfect world, however, and three significant gaps in protection of digital works indisputably remain. First, movie and TV programming owners are concerned about the theft of their digital works distributed in unprotected over-the-air broadcasts - the so-called "broadcast hole." This gap in protection has important policy implications since the lack of copy protection for digital broadcasts poses the risk that high-quality, digital video content will only be available on cable or satellite, where digital rights management technology is available. Some content owners have warned that this could lead to a decline in high-quality content available on free over-the-air terrestrial broadcasts. The same multi-industry group that successfully developed the copy protection system used on the DVD, is working on technical specifications for a "broadcast flag" that adds bits to broadcasts to prevent redistribution online.

Second, content owners are concerned about the audio-visual content delivered "in the clear" to the analog TV sets that are a staple in American households being converted into unprotected digital format and posted on the Internet for free downloading. The most promising technical solution for this so-called "analog hole" appears to be watermarking copy control technology - and this solution is also the subject of multi-industry meetings.

Finally, all content owners are concerned about peer-to-peer distribution services that facilitate the downloading of vast selections of valuable content for free. The hard reality is that unless the content is protected at the outset of the distribution chain, there is no easy technical solution to stop online piracy over these systems, other than tough enforcement.

Problems with Legislated Mandates. Despite the great strides that have been made over the last few years to find technical solutions to protect digital works in a variety of distribution channels and forms, some are now telling the Congress that progress on finding technical solutions to the remaining gaps in protection are at an "impasse." (Testimony of Peter Chernin, at hearing before Senate Commerce Committee, February 28, 2002, at p. 91; testimony of Michael Eisner, id., at p. 92). As a result, they are seeking congressional intervention to give the information technology companies a limited time to find solutions or else turn the entire job of developing digital rights management systems over to a government agency. This strikes me as wrong-headed.

As I cautioned when the Hatch-Leahy distance education bill, the TEACH Act, S. 487, passed the Senate last summer, "copyright owners are a diverse group, and some owners may want more flexibility and variety in the technical protection measures available for their works than would result if the government intervened too soon and mandated a particular standard or system." (Congressional Record, June 7, 2001, S. 5990). A government-mandated technical standard may produce a one-size-fits-all technology that may not suit the purposes of all content owner and end up stifling innovative new technologies and implementations. There is no guarantee that the government agency will select the best technology to become the American standard or in any shorter time period than the voluntary, industry-led process currently underway, to the long-term disadvantage of both content owners and technology companies.

Marketplace Solutions. America's creators, innovators and consumers have and will continue to gain a great deal if the private sector works cooperatively to ensure that digital content can be distributed efficiently and securely. Deployment of effective anti-piracy tools to fill the remaining gaps in coverage is critically important because the absence of such tools may affect the development of new product offerings - whether for broadband or consumer products.

In my view, the private sector is best situated to guarantee that innovation - both technological innovation and creative innovation - continues without limitation or inhibition. Government regulators are simply not close enough to the marketplace to be in the best position to craft the kinds of robust standards that will protect the vital and vibrant asset that is given to consumers around the globe by America's entertainment and copyright industries.

Monitoring of Progress by Committee. These are important issues, and this Committee will remain fully engaged, as we have in the past, in protecting the rights and interests of content owners and consumers, while fostering technical innovation. To assist us in that effort, Senator Hatch and I would ask the senior executives at media, information technology, and consumer electronics companies to get more involved in the discussions underway about digital rights management systems, and make sure that the people participating in those talks meet on a regular and frequent basis. We urge you to make sure that they have the appropriate level of seniority, know how and experience to keep the negotiations moving forward in a productive, timely manner. For example, you may want to have a monthly conference call with your peers where you talk about the progress of the various working groups -- and help break through the inevitable roadblocks. We hope that you will also be in touch with each industry sector leader to make sure that solutions are not only consensus-based, technically feasible and cost effective, but also timely and consumer friendly. Jack Valenti, Hilary Rosen and others have been briefing us about these discussions for years. We would ask that leaders from the content and information technology companies send us regular updates every two months to keep us posted on the state of the negotiations for finding solutions to the remaining gaps in protection for digital content, and how the interests of consumers are being addressed.

These progress reports are important not just for this Committee but for many stakeholders, including Internet users and consumers of digital content. The Committee has set up a new page on the Committee Web site to post these progress reports. The page is called "Protecting Creative Works In A Digital Age: What Is At Stake For Content Creators, Purveyors and Users?" It can be found at [[www.judiciary.senate.gov](http://www.judiciary.senate.gov)]. For those who are following this important debate, we have

also provided links to relevant legislation and Committee hearings. We hope to hear from many stakeholders, consumers and Internet users on this issue and, particularly, as progress reports are made and posted. We will have an email address where comments may be sent and portions of those comments will be posted for perusal on the site.

We appreciate that complicated problems do not lend themselves to quick and easy solutions, and we stand ready to help move these private sector discussions to a timely conclusion. We know that legislation may be necessary to implement some of the intra-industry agreements that are reached and we want to be in a position to move promptly and thoughtfully when the time is ripe.

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