Statement of Senator Sam Brownback

Consumer, Schools, and Libraries Digital Rights Management

Awareness Act of 2003

September 16, 2003

MR. BROWNBACK. Mr. President, I rise to introduce the Consumers, Schools, and Libraries Digital Rights Management Act of 2003, legislation I view as vital for American consumers and our nation's educational community as they venture forth into the 21st century digital media marketplace.

This legislation responds directly to ongoing litigation between the Recording Industry Association of America and Internet service providers Verizon and SBC Communications. This litigation has opened wide all identifying information an ISP maintains on its subscribers, effectively requiring ISPs to make that information available to *any* party simply requesting the information. The legislation also creates certain minimal protections for consumers legally interacting with digital media products protected by new digital rights management technologies.

I had intended to introduce individual pieces of legislation on these issues – privacy and digital rights management. However, given that both issues are so relevant to consumers in the digital age, I ultimately decided to present them to my colleagues in one comprehensive bill.

Privacy Protection

It has been determined by a federal court that a provision of the Digital Millennium Copyright Act permits the RIAA to obtain this ISP subscriber's identifying information without any judicial supervision, or any due process for the subscriber. Today, right now, solely due to this court decision, all that is required for a person to obtain the name and address of an individual who can only be identified by their Internet Protocol address – their Internet phone number – is to *claim* to be a copyright owner, file a one page subpoena request with a clerk of the court, a declaration *swearing* that you *truly* believe an ISP's subscriber is pirating your copyright, the clerk will then send the request to the ISP, and the ISP has no choice but to divulge the identifying information of the subscriber – name, address, phone number – to the complaining party. There are no checks, no balances, and the *alleged* pirate has no opportunity to defend themselves. My colleagues, this issue is about <u>privacy</u> not piracy.

The real harm here is that nothing in this quasi-subpoena process prevents someone *other* than a digital media owner – say a stalker, a pedophile, a telemarketer or even a spammer from using this quasi subpoena process to gain the identity of Internet subscribers, including our children. In fact, we cannot even limit this subpoena process to *mainstream* copyright owners.

This past July, SBC Communications received a subpoena request for the personal information of approximately 60 of its Internet subscribers. The copyright owner that made the request is a hard core pornographer named Titan Media. We cannot permit the continued existence of a private subpoena that can be used by pornographers to easily identify Americans. If you have any doubt, all you need to do is look into the generous amnesty program offered by Titan Media to those it accuses of piracy: buy their porn, and they won't use the subpoena to identify you. The threat of abuse is simply too great, as Titan Media has already demonstrated.

The Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003 requires the owners of digital media products to file an actual case in a court of law in order to obtain the identifying information of an ISP subscriber. This will provide immediate privacy protections to Internet subscribers by forcing their accusers to appear publicly in a court of law, where those with illicit intentions will not tread, and provides the accused with due process required to properly defend themselves.

In addition, the bill requires the Federal Trade Commission to study alternative means to this subpoena process, so that we may empower our nation's intellectual property owners to defend their rights by pursuing those who are stealing from them, but to do so in a safe, private, confidential manner where consumers are concerned, and without burdening the courts. Transitioning to an FTC process will ensure that there can be speedy verification, due process, safety, and maximum protection for the innocent, while preserving maximum civil enforcement against pirates.

I do not offer this legislation to debate the history and merits of the DMCA. I offer this legislation for my colleagues consideration, because I find it untenable that any Internet subscribers' identifying information can be obtained, under government auspices no less, without any oversight or due process.

I want to be clear on an important point. This subpoena is mostly being sought by mainstream digital media owners who are seeking to prevent piracy performed using peer to peer file sharing software. While I am as disappointed as anyone that the mighty RIAA would choose to force a little 12 year old girl – one of the Internet subscribers identified through an RIAA subpoena – and her mother to pay them $2000 for the girl's piracy, I am still opposed to piracy as much as any Member of Congress. I have a strong record on property rights to back that up. I have no interest in seeking to shield those who have committed piracy from the law or hamper the ability of property owners to defend their rights. My concern with this quasi-subpoena process is with the problems it creates. I have made it very clear to all stakeholders that I stand ready to work on alternative legislation if they prefer something else to this provision, but unfortunately that offer has been flatly rejected.

Digital Rights Management

This week the Senate voted to reverse the Federal Communications Commission's new media ownership regulations. I opposed that resolution, because I do not believe the FCC's amendments to its media outlet ownership rules are a threat to competition, and diversity. However, I do stand with my colleagues in supporting a media marketplace where information flows from numerous sources and our constituents are empowered by a full range of robust digital outlets and new digital technologies available to them in the 21st century media marketplace. While well intentioned, I believe my colleagues are simply focusing on the wrong issues in the current debate over media ownership.

Digital rights management, otherwise known simply as DRM, refers to the growing body of technology – software and hardware – that controls access to and use of information, including the ability of individuals to distribute that information over the Internet. Over the past few years the large media companies have persistently sought out new laws and regulations that would mandate DRM in the marketplace, denying consumers and the educational community the use of media products as has been customarily and legally permitted.

As a result, the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003 will preclude the FCC from mandating that consumer electronics, computer hardware, telecommunications networks, and any other technology that facilitates the use of digital media products, such as movies, music, or software, be built to respond to particular digital rights management technologies.

Consumers and the educational community are legally permitted to use media products in a host of ways. Some of these uses are specifically identified in the Copyright Act as limitations on the rights of copyright owners. Many of these uses are the result of court decisions interpreting one of those limitations, the limitation known as Fair Use, and customs based on those court decisions. As a result, consumers can record cable and broadcast programming for non-commercial, private home use. They can lend DVDs and CDs to friends and family. They can make copies of movies and music in different formats so that they can use them with different types of playback devices. Media products can be used for criticism, research, and a range of other educational purposes that include acts of redistribution. All of these uses of content can be made by consumers and the educational community under the Copyright Act, and none of them require the permission of the copyright owner.

The same digital marketplace that has given rise to DRM is also updating the ways consumers and the educational community may use media products in powerful new ways. Broadband connectivity and new digital networking technologies – used in homes, offices, schools, and libraries – raise the prospect of never having to use physical media again. Instead, consumers, employees, students, and library patrons could access legally owned and legally possessed media products that reside on such a network remotely, via the Internet. These developments could revolutionize the information age at its onset.

Digital rights management can both help and hinder this evolutionary process. DRM can be a powerful tool for combating digital piracy. It can tether digital content to specific devices, preventing that content from being used on other devices. DRM can also prohibit Internet redistribution of digital media products.

DRM also has its downside, especially when it is incorporated into digital media products, and purchased unwittingly by consumers. Some consumers have already become acquainted with DRM in the marketplace this way. Less than two years ago music labels began selling copy-protected CDs. Consumers came to find their CDs – that look just like the CDs they have been purchasing for years – would not play on many personal computers, and in some instances became lodged inside them. In addition, they could no longer make the legal practice of converting them into digital MP3 files for use on portable MP3 players. More recently, consumers purchasing the popular tax filing software, Turbo Tax, came to realize they could only use the software on the first computer they downloaded it onto, never mind situations where they desperately needed to complete their tax filings on a different computer. I have no doubt that came as a nice surprise to taxpayers pressing to meet filing deadlines. It is my understanding that many consumers are registering their view on this use of DRM by purchasing competing software not so limited.

When combined with government mandates requiring that all consumer appliances use or respond to specific DRM technologies and capabilities, the potential for mass consumer confusion and disservice is clear. I introduce this legislation today, because DRM mandates sought by the major media companies are threatening to create just such an experience for consumers and the educational community. I can think of no greater threat to media and information diversity and competition than large, vertically integrated media and Internet companies using DRM technology mandates to not only control distribution of content, but also the ways in which that content is used by consumers in the privacy of their homes, by teachers in our nation's classrooms and educational institutions, and by all Americans in our libraries.

Last week, the Federal Communications Commission adopted regulations approving a private sector agreement between the cable TV industry and the consumer electronics industry, called the Cable-CE "Plug and Play" agreement. The Plug and Play agreement governs how consumer electronics devices, information technology, and cable TV networks work together. Both the cable TV and CE industries should be commended for working together to make digital TV sets "cable ready," and speeding the transition to digital television for consumers.

This private agreement includes digital rights management provisions – called "encoding rules – that are aimed at protecting cable TV programing from piracy, but in a manner that seeks to *preserve* the customary and legal uses of media by consumers and the educational community to the greatest degree possible.

The agreement is technology neutral, in that new DRM content protection technologies may be devised and deemed compliant with the security protocols of the

Plug and Play agreement. A proponent of a new content protection technology has a right to appeal to the FCC if Cable Labs rejects that technology, and the FCC will conduct a de novo review based on objective criteria. Unfortunately, the Commission may take a very different approach in protecting broadcast digital television programming from piracy in its "Broadcast Flag" proceeding, as first proposed by the big media companies, and later joined by a very select group of electronics companies that own the patent in the one DRM technology, 5C, approved for use in the proposal. The broadcast flag proposal requires every device that receives digital television content to recognize a "flag" that can be attached to DTV programming, and to respond to the flag by encrypting the content using an "authorized technology" that would be expressly required by FCC regulation.

Unlike the Plug and Play agreement, the broadcast flag proposal makes it difficult for new DRM technologies to be deemed "Broadcast Flag" compliant. The principal approval role for alternate DRM content protection technologies is vested in several big media companies and some of the narrow group of electronics companies owning the patent in 5C. In the only circumstance under this proposal where the FCC would have a role in approving a new technology, the baseline for FCC consideration would be the preordained 5C technology and their associated license terms. I hardly consider a proposal to be technology neutral when such important competitive determinations are placed in the hands of invested stakeholders as gatekeepers. Such a proposal deprives the market place of the very qualities the media companies need to fight piracy: competition and innovation. I commend Intel, one of the 5C companies, for recognizing this grim reality and being bold enough to support a different course, as I will outline in a moment.

The importance of technological neutrality in the Plug and Play agreement versus the tech mandate in the Broadcast Flag becomes very clear when you review the particular provisions of each agreement.

In today's world, a DRM technology does not seem to exist that can both permit consumers to use the Internet to legally access content stored in their homes – on a home network for instance – while also preventing the unfettered Internet redistribution of such content. However, because the Cable-CE agreement envisions new DRM technologies, and makes it possible for them to be approved for use with cable networks and CE devices, the potential for a new DRM technology that can strike this important balance exists.

Since the Flag proposal is so closed off to new technologies, it is unlikely that it will evolve to permit point-to-point redistribution of digital broadcast content over the Internet, for example, from one's home ot one's office or from a son or daughter to an elderly parent. Furthermore 5C is capable of completely locking down the ways consumers and the educational community can record or otherwise use DTV content. It is no wonder then that the technical specifications for the actual Flag itself in major media's proposal provides for the possibility that it can be used to send new, more restrictive encoding rules to consumer electronics devices that operate DTV content.

The Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003 will ensure that anti-piracy policies for broadcast DTV will provide maximum protections for industry, but in a manner that relies on innovation, competition, and serving the interests of consumers to achieve that goal.

First, the bill prohibits the Federal Communications Commission from moving forward with any *new* proceedings that impact the ways in which consumers may access or distribute digital media products, aside from the two previously mentioned proceedings. This will negate any future efforts by the big media companies to further expand the ways in which they can control how content may be legally used.

Second, the bill sets ground rules for the FCC's broadcast flag proceeding. It permits the FCC, if it has such authority, to require consumer electronics companies to detect a Broadcast Flag and prohibit illegal Internet retransmission of digital broadcast programming to the public when it detects the flag. However, this proposal relies on a self-certification requirement, so consumer electronics and information technology companies can deploy competing and innovative DRMs that prohibit DTV piracy immediately, not subject to the whims of industry gatekeepers. Like the Plug and Play agreement this proposal provides a meaningful role for the FCC, not industry stakeholders, to resolve any controversies that may arise with new technologies.

In addition to addressing the threat of FCC tech mandates in the broadcast DTV space, this legislation also addresses other important concerns regarding the introduction of DRM into the marketplace, to prevent some of the experiences of consumers with this important technology to date.

First, the bill provides one year for all stakeholders in the digital media marketplace to voluntarily devise a labeling regime for all DRM-enabled digital media products, including those made available solely online, so consumers will know what they are buying when they buy it.

Second, the bill prohibits the use of DRM technologies to prevent consumers from reselling the used digital media products they no longer want, or from donating used digital media products to schools and libraries.

Finally, the bill directs the Federal Trade Commission – our nation's premier consumer protection agency – to carefully monitor the introduction of DRM into the marketplace, reporting to Congress in incidents of consumer confusion and dissatisfaction, and suggesting measures that can ease the impact DRM has on law abiding consumers.

The Senate has responded to what many view as the threat of increasing consolidation in the media marketplace. If my colleagues are concerned with consolidation in outlet ownership then I have no doubt they will be equally concerned with Federally-mandated controls over how consumers and the educational community may actually use information flowing through those outlets. Piracy Prevention is a goal

we can all work together to pursue. DRM-mandated business models, however, should not be the product of this Congress or any agency under our jurisdiction. The Federal Communications Commission seems to be missing this point. I encourage all of my colleagues to work with me to put the brakes on the FCC. Support the Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003.