

EDITED TRANSCRIPT OF THE DAVID NELSON MEMORIAL KEYNOTE ADDRESS: A VOICE FROM CONGRESS ON DRM

By Rep. Zoe Lofgren (D-California)

It's an honor to be here to deliver the David Nelson memorial address. I'd like to thank Pam Samuelson for her gracious invitation to be here today and for her help and expert input on so many of the topics that face us as a nation. I see a lot of friends here this morning too so thank you for being here. As we all know a massive digital media revolution is really unfolding before our eyes. From MP3 players to P2P networks, from digital televisions to personal video recorders, like ReplayTV and TiVo, from e-books to web casting, digital media is changing the way we listen to and view our favorite movies, songs, and books. And like most technological breakthroughs in the past, from the player piano to the VCR, the revolution has aroused deep emotions within the so-called content community. While Jack Valenti has sometimes borne the brunt of unkind comments in the technology community, Jack is someone whom I actually like very much, and who I respect even though I do not always agree with him. I want to read you a quote from Jack, which he has since admitted was incorrect, but if you substitute digital technology for VCR in the quote, it could have been made yesterday. It actually dates back to 1982. Quote: "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone. . . . We are going to bleed and bleed and hemorrhage, unless this Congress at least protect[s] one industry that is able to retrieve a surplus balance of trade and whose total future depends on its protection from the savagery and ravages of this machine."

The content industry is actually singing the same tune today. Networks are worried that people will automatically skip commercials with personal video recorders. The studios and the music labels are worried that people will take perfect digital copies of their movies and songs instead of going to the movies or buying CDs.

A few years ago, Congress enacted the Digital Millennium Copyright Act to address their concerns. In return, content owners were supposed to embrace digital technology. Now, almost five years later, content owners are just starting to experiment with new business models that include digital distribution. In my opinion, their progress has been very slow and is at the very least a contributing factor to the huge piracy problem that we face

today. But what's even more troubling is that while content owners have failed to deliver on their promise to embrace digital distribution, the DMCA has also had a number of adverse affects on consumers and entrepreneurs.

As I was thinking about what to say this morning, I took a trip down memory lane. I have been on the House Judiciary Committee for eight years and I've been a member of the Intellectual Property Subcommittee for six. I do believe that protection of intellectual property is important. Copyrights and patents deserve respect, but I also know that intellectual property isn't like Whiteacre and Blackacre and, in fact, you really need to go back to the Constitution to look at what it is we're protecting. In Article 1, Section 8, Congress is asked to secure, for limited times, an author's exclusive right to their work in order to promote the progress of science and useful arts. So this is not a permanent Whiteacre-Blackacre fee simple ownership. It is part of a deal between society and inventors and artists not only to stimulate creativity and innovation, but also [to] use that as a basis for the advancement of science and culture. There are problems with the DMCA relating to fair use and other noninfringing uses that I don't think any of us really had in mind when we drafted the bill. The DMCA, I think, cedes too much power to copyright owners who have no limits on what technical restrictions they put on content. For example, online publishers don't just set the price of digital books, they can control where consumers read books, and the amount of time consumers have to read books. They can even prevent a consumer from sharing their copy with a friend or a family member. Publishers never had this power before. If I buy a book at Barnes and Noble, which I do a lot, a publisher can't control what I do with my copy. I can read it over and over, I can lend it to my son, I can read it at home, on a plane, [and] on vacation.

Copyright holders must recognize that my expectations don't change just because I choose to purchase their product in another format. Another example occurred last year when music fans were shocked to learn that they couldn't play some of their store-bought CDs on their computers. The new CDs even made some Mac computers lock up completely. At the same time, consumers are prevented from circumventing restrictions for any reason, including fair use. It is unlawful to disseminate information about how to evade an encryption, punishable by up to five years in prison and a \$500,000 fine.

So what is fair use? It's an important safeguard that's been recognized, as you know, by statute and by the United States Supreme Court, that tries to balance the competing interests of copyright holders in protecting their works, and the public, which needs to have access to information and to be

able to share ideas and to innovate. Really it's what the Framers envisioned when they asked Congress to find that balance. Traditionally, copyright law never gave total control to copyright owners, [whereas] digital rights management, backed by Section 1201 of the DMCA, potentially gives them that power.

[Content holders] can now put a lock . . . on content and restrict fair use and other noninfringing uses, and the public can't do anything about it because it's a crime. I don't think the authors of the DMCA really intended to create such a dramatic shift in the balance. The House Judiciary report accompanying the DMCA stated, and I quote: "an individual should not be able to circumvent in order to gain unauthorized access to a work," but here's the important part, "but should be able to do so in order to make fair use of work that he or she has acquired lawfully." That's what members of Congress thought they were voting to do, however we went much further. We've destroyed the first-sale doctrine. The current system has the potential to destroy, and actually has already destroyed, the first-sale doctrine. It also has the potential of extending copyright in perpetuity. I had the privilege of watching Larry Lessig argue the *Eldred* case before the Supreme Court. I was really intrigued to watch it and I noticed that Larry was very disappointed in the results, and it may seem strange for a member of Congress, but I thought the result was bizarre. If we can't regulate guns in junior high schools based on the implied limitations of the Commerce Clause, the *Eldred* case really makes no sense whatsoever. In any case the point is that given Section 1201 of the Act, even though material is in the public and no longer protected under copyright, [through] technological means, one can, in effect, control content forever, and that is something that I think we really must address.

We've also dampened technological development and competition through the DMCA, and I know that this was not something that we really had in mind. I come from Silicon Valley, I represent Silicon Valley, and every week I come home, and every week I try to visit a new company, usually start-ups or small guys, to see what they are doing. Some of the people I've visited in the past are now running into big problems with the DMCA, like Sonicblue, which created Replay TV. Twenty percent of their quarterly spending is now on litigation. They're trying to lead in innovation but they get sued at every turn. DMCA is chilling competition. Take the case of Lexmark, and this is something I know none of us had in mind. Lexmark-brand printers now have a cryptographic handshake so that the printer can recognize the cartridge. A company called Static Control figured out how to defeat the handshake and build a competing cartridge that worked with Lexmark printers. Lexmark sued under 1201 of the DMCA,

claiming that the handshake is a technological measure that effectively controls access to Lexmark's printer software, [even though] there is no content that is being protected by the handshake.

Now some would say in Washington, "Not a problem because the case is yet to be resolved," but the point is that in Silicon Valley, and in the world at large, it's hard to get venture capital if you're going to spend half of your venture loan on litigation. People are afraid to proceed on innovative measures. I recently met with a company in my district that is working on some technologies to stream digital video from the desktop to the flat panel [television] on the wall. Pretty soon even those of us who aren't rich are going to be able to buy a flat panel and hang it on the wall. I think that'll be really cool, except it's not going to work if we can't get the signals to the flat panel. They've had to stop their technology because it violates the DMCA. And the question is: Why would we do that to ourselves and to society?

In addition to the DMCA chilling innovations, there are other things that are being chilled. Recently I met with another constituent who no longer is pursuing technology to screen songs over cell phones because of the difficulties and the litigations that would result. In addition to the technology innovations that are being chilled, I think there are some other things that are just going to tick off consumers. I gave this to John Conyers on the floor on Thursday: Dateline Detroit, February 24th. WDET 101.9 FM—it's Detroit public radio—they have had to suspend streaming their music program from their website because the RIAA says it violates the DMCA. The RIAA has established these rules: the station is not allowed to play more than two songs in a row by the same artist, not allowed to play more than four songs by the same artist within a three hour period, and so WDET has just stopped streaming their show. Now how does that help advance the course of culture. John Conyers read this on the floor while we were busily making it a felony for scientists to conduct somatic cell nuclear transfer research, and [he] said, "My God, that's my town." Yes indeed. We need to address these issues. And I think a small reflection on how the DMCA was enacted may help us understand the challenges that we face in making the changes.

I was sworn into Congress in January of 1995. As you recall that was the famous moment when Dick Gephardt handed the gavel to Newt Gingrich and it was "Contract with America" time. Shut down the government. It was chaos, the revolutionaries were going to change the world, and so we didn't have time for something as mundane as copyright in the 104th Congress. But by the 105th Congress, there was great concern on the part of very large interests. I mean the movie business, the recording

industries. They were at risk because of the digital revolution and they helped put together the outlines of the DMCA. Now I met with a brand new member of the Intellectual Property Subcommittee and I looked at the bill and I saw some problems, but the bigger problem in retrospect that I see was, on the committee, I was the tech expert. I mean we're in trouble when that occurs. I'm a lawyer, not a techie. I like to play with technology and try to understand it, so I did at least understand that one of the first drafts outlawed web browsers; and I remember calling John Place, who was then general counsel of Yahoo!, who I had met, and I said, "John you need to pay attention to this bill because it outlaws web browsing, and I think that would have an impact on Yahoo!." But they were busy. When I was elected, Jerry Yang was still in a dorm room at Stanford, Marc Andreessen was in the Midwest; these people were building companies rapidly, they were on the cutting edge of technology. They were young and they didn't know Washington and they didn't think what Washington did really would matter to them.

So in the end, we did sort out the web browser problem, but we didn't have any counterforce against the Hollywood people, the RIAA people, and the publishers. And you have to understand that these industry groups have established ties over decades. They are known, they are friendly, they are great lobbyists, and so we ended up with some real problems. I remember Rick Boucher, who was the senior member of the Subcommittee, offering an amendment that indicated that Section 1201 would not apply if the intent was to pursue a noninfringing use. That amendment got two votes: me and Rick. So this is the situation that we find in Washington today. Fortunately, some in the tech world now—after Yahoo went through that experience and realized that most companies wouldn't have a member of the Committee call them four or five times to tell them that they need to pay attention—have hired people to represent their interests; and so now you do have more debate. I'm hopeful that the bill that I introduced last Congress, and I will introduce again next week, could be a vehicle for correcting some of the problems in the DMCA. I think that the bill would ensure that consumers would be able to buy content that is compatible across platforms, [which] would encourage technological development and competition. Specifically, it would allow consumers to make backup copies and to play digital works on preferred digital media devices. It also maintains the first-sale doctrine in the digital age, allowing consumers to sell, in a legal way, their copy of digital works just like they can in the analog world. It also protects fair use rights, and other noninfringing rights, in a world where technology gives copyrighters the power to control all downstream uses of content. Under my bill, consumers would be allowed to cir-

cumvent technical restrictions if those restrictions impeded their rights to make noninfringing use of what they lawfully obtained, and they are given no other choice. In that vein, unlike other proposals, my bill would provide flexibility for content owners to protect their content so long as they enable users to make legitimate uses of the content that they obtained. I believe that, contrary to the claims of some in Washington, this bill does not destroy the DMCA. It would still be illegal to circumvent, or to gain unauthorized access to illegally distribute content. It provides a defense to consumers and I don't think the content industry should be afraid of it.

A Norwegian court recently said in its DeCSS ruling, you shouldn't be prohibited from breaking into your own property. Copyright holders would argue that a consumer hasn't bought any property, but I think they are missing the point. The . . . access to content they're concerned about, is not breaking encryption on the CD that you purchased, it's creating a million CDs in Brazil and selling them, and that is something that I think is legitimately a concern. I'm not hostile to the need to provide financial incentives to those who create content. I think that is very important; but I also equally believe that we need to respect the rights over not just the property, but the rights of the consuming public and really the culture to have information flow. Finally, I think we should understand that this is a battle that is not limited to the United States. Recently, I read in Tech Daily that Mr. Zoellick, our trade negotiator, has made a trade deal with Australia, contingent on their adoption of our version of the DMCA. So we need to be very alert to make sure that that is opposed, and that we get our Congress to listen up and correct the defects in the Digital Millennium Copyright Act. I think this conference is part of doing that. Thank you for being part of it, and I look forward to hearing more. Thank you very much.