

Copyright Back on Congressional Agenda

By George H. Pike*

When the 110th Congress began in January there seemed to be little interest in copyright legislation. The newly elected Democratic majority was focused on reviewing Bush Administration policies on terrorism and privacy. There was continuing interest in patent reform, but a flurry of copyright bills that had been proposed at the end of the 109th Congress—including orphan works proposals, digital fair use reform, and copyright modernization—failed to emerge in 2007. A couple of proposals were offered to harmonize copyright licensing and to clarify the DMCA's fair use provisions, but there was no “buzz” about copyright. Until recently, that is.

Quietly, in November, then with a bit of a bigger splash in December, bills providing for enhanced copyright enforcement provisions were introduced in the Senate and House respectively. Neither bill deals with digital fair use or orphan works, but hearings on the House bill raised the glimmer of broader copyright reform being in Congress's future.

30 years old

Most of current copyright law dates to the mid 1970's. The Copyright Act of 1976 represented a rewrite and replacement of the 60-plus year old Copyright Act of 1909. Among the changes that came into effect in 1976 was the fair use doctrine, an extension and simplification of the length of a copyright's term, a change that established copyright at the moment a work is created, rather than when a work is published, and elimination of mandatory notice and registration requirements. The 1976 Act was also supposed to be “technology neutral”, applying equally to any copyrighted work regardless of its format.

The Act has seen several amendments and additions over the years, most notably the Copyright Term Extension Act, the Digital Millennium Copyright Act, and the Family Entertainment and Copyright Act. Many of these changes have been triggered by the technological changes of the digital age. However, most commentators would agree that copyright law has been challenged to deal with the Internet, globalization and the ease at which digital materials can be infringed.

This latest round of proposals continues that theme. In November, the Senate introduced the Intellectual Property Enforcement Act (IPEA), and a month later, the House introduced the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act. Both bills propose a number of steps to both strengthen enforcement of copyright laws, and increase criminal and civil penalties for copyright infringement.

IP investigative units

Both proposals would establish dedicated intellectual property investigative units within the FBI, the Department of Justice and/or the Executive Office of the President. The goal of these units would be to coordinate IP enforcement activities among government and international agencies. Both bills would also mandate a strategic plan to identify, disrupt,

and/or eliminate persons and businesses involved in trafficking of counterfeit and pirated goods and sharing information among relevant agencies. The plan would also work with other countries to strengthen IP enforcement and reduce the number of countries that fail to enforce anti-counterfeit and piracy laws.

Criminal penalties for copyright infringement would be enhanced. Both bills would strengthen the government's ability to seize property that is "used or intended to be used" for copyright infringement, broaden the amount of property that can be seized, and make it easier for the courts to order seized property to be forfeited to the government. Both proposals would also eliminate the requirement that copyrighted works be registered before they could be the subject of a criminal action against an infringer.

Infringement of compiled works

A controversial component of the House bill would change the civil penalties for copyright infringement of compiled works. The current law recognizes a compiled work as a single act of infringement, even though there may be more than one work that was infringed in order to create the compilation. The proposal would penalize each separate act of infringement in a compiled works. In this case, a pirated music CD with 12 songs would be subject to twelve times the penalty.

The Senate bill has its own controversial provision in a proposal to allow the Department of Justice to initiate a civil lawsuit against an infringer rather than a criminal action. The advantage to the government is that civil actions do not require the government to prove infringement beyond a reasonable doubt. Current law only allows the copyright owner to initiate a lawsuit against an infringer.

The House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property held hearings on the PRO-IP bill on December 13, 2007. Testifying at the hearing were representatives of the Justice Department, organized labor, the Coalition against Counterfeiting and Piracy, and Public Knowledge, an organization representing content users.

Economic costs

All of the witnesses recognized that copyright piracy and counterfeiting were serious issues, costing the U.S. economy as much as \$600 billion and the loss of up to 750,000 jobs.

Richard Cotton, General Counsel for NBC Universal, and Chairman of the Coalition Against Counterfeiting and Piracy (CACP), pointed out that counterfeiting and piracy do not just effect the media industries. Counterfeit pharmaceuticals, auto parts, consumer goods, aircraft parts, animal food and other products create not only economic damage, but in some cases can be life-threatening.

In its testimony, the Justice Department outlined recent efforts and successes in intellectual property enforcement. However, they also expressed concern that the creation of dedicated IP investigative units might actually dilute enforcement efforts and unnecessarily increase bureaucratic and administrative costs.

Representing content users was Public Knowledge, a public interest advocacy group. While affirming the need for the effective enforcement of intellectual property laws, they raised concerns that the PRO-IP Act would ensnare “ordinary consumers” in overly broad laws, and that higher damages could chill legitimate uses of copyrighted materials while having little deterrent effect.

Other copyright issues

However, it was the statements of the committee members, along with the questions posed to the witnesses, suggested that the copyright “buzz” has returned to Congress. Subcommittee Chair, Howard Berman (D-CA) noted that the bill did not cover a number of issues facing both copyright issues and users, and suggested that addressing those issues was in the Committee’s near future.

Among these issues were the protections given to Internet service and content providers against infringement, defamation and other illegal acts of their users. The DMCA and the Communications Decency Act give providers the ability to avoid legal responsibility from these acts. In the case of copyright infringement the immunity applies until the copyright owner provides notice to the ISP. In cases of defamation most courts have found the immunity to be absolute. In both cases, the goal of these protections—a free and unfettered Internet—has lead to abuses.

Protecting fair use

Chairman Berman, Rep. Howard Boucher (D-VA), and Rep. Darrell Issa (R-CA) also expressed concern about protecting legitimate fair use. They suggested that current law did not adequately distinguish between a legitimate dispute over fair use and willfully taking the property of others. In copyright, the risk of statutory, minimum damages applies to every act of infringement and fear of these statutory damages may inhibit innovation based on fair use. Rep. Issa compared copyright with patent law, that did not have a “per-piece” or per act minimum damages, yet protected patent owners. Both Chairman Berman and Rep. Boucher expressed interest in Boucher’s H.R. 1201, which would shield businesses from some categories of statutory damages, and called for a more rigorous review of the ability to permit the fair use of works covered by digital rights management technologies.

Chairman Berman and Rep Adam Schiff (D-CA) also were opening to re-exploring filtering technologies, particularly in higher education. Both Representatives noted that educational institutions are the beneficiaries of several copyright exemptions, particularly fair use, Section 108 copying by libraries and archives, and the TEACH Act. They raised the notion of tying those exemptions to an obligation to use filters to screen out both

obscene content as well as infringing activities. Chairman Berman also pledged to put the “orphan works” problem back on the committee’s agenda in early 2008.

These bills and these discussions do not necessarily mean that a new Copyright Act of 2008, 09 or 10 is imminent; at best there were some wistful hints of interest. What was more pronounced was the need to look beyond the existing Copyright Act for solutions to the real and critical problems of piracy and counterfeiting occurring on a worldwide level.

International trade

Proposal such as IPEA and the PRO-IP Act would only address U.S. jurisdictions, and run the risk of ensnaring fair uses or “trivial” infringers, while overseas piracy continues. Incorporating anti-piracy and anti-counterfeiting provisions into international trade agreements was a possibility suggested at the hearings. Increased inspections of imports and “turning away” containers of counterfeit goods at U.S. ports was another. Increasing targeted international IP enforcement was a universal theme, even among the content user advocates.

Copyright law may not be broken enough to require a complete overhaul. But it’s taking a bit of a beating in the digital age and it may be that band-aid solutions can no longer do the trick.

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