



The No Electronic Theft Act: Stop Internet Piracy!

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LEGISLATIVE UPDATES

THE NO ELECTRONIC THEFT ACT: STOP INTERNET PIRACY!

INTRODUCTION

The Internet has become a valuable source for users to gather information. One can obtain information relating to almost any topic imaginable, from the latest up-to-the-minute fantasy football scores¹ to learning about dinosaurs,² finding new computer software³ or listening to Garth Brooks' latest album.⁴ In sum, the Internet is a great place to learn and have fun. According to Rep. Bob Goodlatte, the Internet's "true potential lies in the future, when students and teachers can access a wealth of information through the click of a computer mouse."⁵ However, the Internet is more than just fun and games. Accessing the Internet for improper purposes can put a user behind bars instead of in front of their computer screen. It is hard to imagine how one could actually violate federal laws while playing on the Internet, but in reality it is not that difficult. Countless computer programs and games have been posted on the web for others to download.⁶ The problem is that many of these programs are not legally posted on the Internet;

1. CBS SportsLine Fantasy Football: Fantasy Scoring Center.

(visited 11/16/98). <<http://ww3.sprotsline.com/u/fantasy/football/fflive.htm>>.

2. Encyclopedia Britannica presents Discovery Dinosaurs.

(visited 11/16/98). <<http://dinosaurs.eb.com/dinosaurs/index2.html>>.

3. Software Depot.

(visited 11/16/98). <<http://software-depot.netscape.com/index.htm>>.

4. Planet Garth: Multimedia.

(visited 11/16/98). <<http://www.planetgarth.com/multimedia/>>.

5. Bob Goodlatte, *Crack Down on Pirates*, USA TODAY., Dec 2, 1997.

Rep. Goodlatte, R-VA, is a member of the House Judiciary Subcommittee on Courts and Intellectual Property and co-sponsor of the No Electronic Theft Act.

6. *No Electronic Theft Act: Hearings on HR 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, Sept. 11, 1997. (Statement of Sandra Sellers, Vice President for Intellectual Property Education and Enforcement, Software Publishers Association).

consequently, they are violating copyright law.⁷ In turn, every user who downloads a program or game to his personal computer could also be violating copyright laws.⁸

In addition to the computer programs that are being pirated,⁹ songs and movies are also a target of illegal copying.¹⁰ With the technological advances in the computer hardware industry, computers now are capable of producing top quality recordings.¹¹ This means that users can download entire record albums and movie clips illegally posted on the web. Consequently, the entertainment business suffers a substantial loss each year to do Internet piracy.¹² Congress enacted the No Electronic Theft Act (“NET Act”) to deter this type of copyright piracy.¹³

Section I of this article will discuss the problems in the copyright industry leading to the need for the NET Act. Section II will review the changes that the NET Act made to copyright law. Section III will analyze the potential effects of the passage of the NET Act, and why it is good.

I. BACKGROUND

A. *The Loophole*

The NET Act was proposed in response to a loophole created by *United States v. LaMacchia*.¹⁴ *LaMacchia* involved a student, 21

7. 17 U.S.C. § 506(a) (1997).

8. 17 U.S.C. § 501 (1997).

9. Pirate is defined as “a person who uses or reproduces the work or invention of another without authorization.” *Webster’s Random House College Dictionary* (1991), p. 1029.

10. *Copyright Piracy in the Internet: Hearing on HR 2265 Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property*, Sept 11, 1997. (Statement of Cary Sherman, Senior Executive Vice President and General Counsel).

11. 143 Cong. Rec. H9883-01, H9884. (Daily Ed. Nov. 4, 1997) (Statement of North Carolina Representative Howard Coble).

12. *Copyright Piracy in the Internet: Hearing on HR 2265 Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property*, Sept 11, 1997. (Statement of Cary Sherman, Senior Executive Vice President and General Counsel).

13. 17 U.S.C. § 506(a) (1997).

14. *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994).

year old David LaMacchia, from the Massachusetts Institute of Technology. LaMacchia, a computer hacker¹⁵, set up an Internet bulletin board named “Cynosure” where he encouraged people to upload¹⁶ copyrighted computer programs, including Excel 5.0, WordPerfect 6.0 and games such as Sim City 2000.

LaMacchia next created “Cynosure II” which was developed to give others access to the programs by allowing them to download¹⁷ the programs onto their home computers.¹⁸ “Cynosure II” enabled people to access free programs and provide programs for others to download, by uploading programs of their own free of charge.¹⁹ The federal government prosecuted LaMacchia for his actions. However, because LaMacchia did not financially profit from his activities the government was unable to charge him with copyright infringement.²⁰ The government had to resort to charging LaMacchia with conspiring to violate the wire fraud statute.²¹ The indictment charged that LaMacchia’s bulletin boards cost various

15. A hacker is defined as a “skilled computer programmer or engineer who loves a techno challenge-especially one that involves accessing and manipulating another individual’s or corporation’s computer.” *Webster’s Random House College Dictionary* (1991), p. 70.

16. *Upload-to transfer a file from a personal computer to a server-or to the net*, WIRED STYLE: PRINCIPLES OF ENGLISH USAGE IN THE DIGITAL AGE, 88 (Constance Hale, ed., 1996).

17. *Download-to copy a document or application from a network or BBS to a personal computer*, WIRED STYLE: PRINCIPLES OF ENGLISH USAGE IN THE DIGITAL AGE, 85 (Constance Hale, ed., 1996).

18. *LaMacchia*, 871 F.Supp. at 536.

19. *Id.* at 535.

20. “Any person who infringes a copyright willfully and for purposes of commercial advantage or private gain shall be punished as provided in section 2319 of title 18.” 17 U.S.C. § 506 (1995) amended by 17 U.S.C. § 506(a) (1997).

21. 18 U.S.C. § 1343. “Fraud by wire, radio, or television. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than \$100,000 or imprisoned not more than 30 years, or both.”

copyright holders more than one million dollars.²² The government's charge subsequently failed because the court concluded that Congress did not intend to protect copyrights under the federal wire fraud statute, but instead intended it to be used in conjunction with the mail fraud statute.²³ However, the court did state that "[o]ne can envision ways that the copyright law could be modified to permit such prosecution. But, '[i]t is the legislature, not the court which is to define a crime, and ordain its punishment.'"²⁴ Unfortunately, a new law could not affect the outcome of *LaMacchia*. His motion to dismiss was granted, thus creating the "LaMacchia Loophole," which allowed LaMacchia to escape punishment for "Cynosure" and "Cynosure II" because he did not benefit from them financially.

B. The Damage Piracy Causes

LaMacchia brought the growing problem of Internet piracy to the attention of the legislature. On November 4, 1997, when Representative Howard Coble from North Carolina made a motion to pass the NET Act, he testified that "industry groups estimate that counterfeiting and piracy of intellectual property-especially computer software, compact discs, and movies-cost the affected copyright holders more than eleven billion dollars last year. [S]ome claim the actual figure is closer to twenty billion dollars."²⁵ Internet piracy has already caused "the loss of thousands of American jobs, higher prices to honest software purchasers, and a billion dollars lost in tax revenues."²⁶ The need for the NET Act will be analyzed, first, for the computer software industry, and next, for the music and motion picture industry.

22. *LaMacchia*, 871 F. Supp. at 535.

23. *Id.* at 540.

24. *Id.* at 545, (quoting *Dowling v. United States*, 473 U.S. 207, 214 (1985) and *United States v. Wiltberger*, 5 L.Ed. 37 (1820)).

25. 143 Cong. Rec. H9883-01, H9884. (Daily Ed. Nov. 4, 1997) (Statement of North Carolina Representative Howard Coble).

26. *Id.*

1. *Computer Software Industry*

Users can pirate computer software in several different ways.²⁷ For example, users can softlift programs. When a user purchases one program and installs it on more than one computer he is guilty of softlifting.²⁸ In addition, there is netlifting, the hard-core pirating.²⁹ Netlifting is when users maintain sites on the Internet and Bulletin Board Systems that offer illegal, unauthorized programs for others to download for free.³⁰ This article will focus mainly on the Netlifting aspect of piracy and the need to put a stop to it.

In the United States alone twenty-seven percent of all software in use has been pirated.³¹ In 1996, piracy of business applications cost the software industry over \$2 billion in the United States.³² Consequently, piracy is a major concern for the software industry. For example, the makers of "Quake," a computer game, believe that "half of the full versions of "Quake" being played are pirate copies."³³ "Quake" is not the exception, it is becoming the norm. Software piracy is ranked in the top ten of software companies concerns.³⁴

27. Ira Rothken, *Are you a Software Pirate?* HOME OFFICE COMPUTING, July 1, 1998, at 122.

28. *Id.*

29. *Id.*

30. *Id.*

31. This figure comes from an independent study that was done in 1996. However, this figure is very conservative because it only considers business application software. In addition, the amount of software distributed over the Internet can not be calculated; therefore, it is not considered in this study. *No Electronic Theft Act: Hearings on HR 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, Sept. 11, 1997. (Statement of Sandra A. Sellers, Vice President for Intellectual Property Education and Enforcement, Software Publishers Association).

32. *Id.*

33. *Id.* (Quoting Todd Hollenshead, CEO of id Software, Inc.).

34. This is according to a recent study done by Price Waterhouse. *No Electronic Theft Act: Hearings on HR 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, Sept. 11, 1997. (Statement of Sandra A. Sellers, Vice President for Intellectual Property Education and Enforcement, Software Publishers Association).

Even the federal government is not exempt from this piracy.³⁵ The Software Publishers Association released a preliminary report on federal agency compliance with US copyright law and computer software use.³⁶ This report contains summaries of studies done on the computers owned by the United States Army and Air Force.³⁷ The report stated that forty-one percent of Army owned computers had undocumented software valued at \$21 million.³⁸ Of the thirty-three reports issued by the Air Force from 1987 through 1991, twenty-eight of them found an unauthorized use of computer software.³⁹ In addition, in 1993, the Department of Defense examined over 1000 computers and found unauthorized software, valued at approximately \$270,000, on 51% of those computers.⁴⁰

Moreover, in January of 1997, The Federal Bureau of Investigations (FBI) began an undercover investigation called "Cyber Strike."⁴¹ The FBI executed eight search warrants simultaneously in six states as part of this investigation.⁴² Cyber Strike was organized to reduce piracy of computer software. More than seven Gigabytes⁴³ of illegal transactions were seized from various locations during this investigation. Eight Bulletin Board Systems, each illegally providing programs for others to download, were disabled and the equipment was seized.⁴⁴

35. The type of piracy discussed here is softlifting.

36. Bill Pietrucha, *SPA Cites Defense, Labor Depts for Illegal Software Use*, NEWBYTES NEWS NETWORK, Sept. 11, 1997, at 4.

37. *Id.* at 6.

38. *Id.*

39. Bill Pietrucha, *SPA Cites Defense, Labor Depts for Illegal Software Use*, NEWBYTES NEWS NETWORK, Sept. 11, 1997, at 6.

40. *Id.* at 5.

41. *Cybercrime, Transnational Crime, & Intellectual Property: Testimony before the Congressional Joint Economic Comm.* March 24, 1998. (Statement of Neil J. Gallagher, Deputy Assistant Director Criminal Division Federal Bureau of Investigation).

42. *Id.* Search warrants were issued in Atlanta, Georgia; Columbus, Ohio; Miami, Florida; Oklahoma City, Oklahoma; Des Moines, Iowa; Pittsburgh, Pennsylvania; San Leandro and Cedar Ridge, California.

43. *Id.* Seven Gigabytes is equal to twenty million pages of information.

44. *Id.*

As a result of computer software piracy,⁴⁵ consumers feel the affects on every \$15 per \$100 spent on buying new software.⁴⁶ The computer software industry has to raise prices in an attempt to balance profit losses due to piracy.⁴⁷ Consequently, the need for the NET Act is substantial to protect the copyright holder of the computer software industry and to keep costs to the consumer to a minimum.

2. *Music and Motion Picture Industry*

Computer software is not the only target of Internet piracy. Music and motion pictures are also affected.⁴⁸ Cary Sherman, Senior Executive Vice President and General Counsel of the Recording Industry Association of America, spoke before the House Committee on the Judiciary Subcommittee on Courts and Intellectual Property in support of the NET Act.⁴⁹ Mr. Sherman stated that piracy “costs the American music industry nearly one million dollars a day in the United States and well over two billion dollars a year worldwide.”⁵⁰

According to Sherman, the statistics listed above are very harmful to everyone in the music industry, including songwriters, musicians, recording artists, background vocalists, and anyone else who contributes their musical talent and expertise to making a record.⁵¹ All these people depend on the music industry to survive

45. This includes both softlifting and netlifting.

46. *Cybercrime, Transnational Crime, & Intellectual Property: Testimony before the Congressional Joint Economic Comm.* March 24, 1998. (Statement of Neil J. Gallagher, Deputy Assistant Director Criminal Division Federal Bureau of Investigation).

47. *Id.*

48. *Copyright Piracy in the Internet: Hearing on HR 2265 Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property*, Sept 11, 1997. (Statement of Cary Sherman, Senior Executive Vice President and General Counsel.)

49. *Id.*

50. *Id.*

51. *Copyright Piracy in the Internet: Hearing on HR 2265 Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property*, Sept 11, 1997. (Statement of Cary Sherman, Senior Executive Vice President and General Counsel).

financially.⁵² Because record companies suffer major losses due to piracy less money is available to discover and develop new musicians.⁵³ Thereby hurting the consumer by limited their selection and rising prices. In addition, record companies rely on the income from the recordings that are successful to subsidize the less profitable types of music such as Classical, Jazz and Gospel.”⁵⁴

Consequently, the more money that is lost due to music piracy, the less likely non-profitable music groups will continue to be able to produce albums.⁵⁵

With this new technology “Internet pirates can download perfect digital copies of copyrighted works, from movies to musical recordings to video games, and distribute them to other Internet users without the knowledge or permission of the copyright holders.”⁵⁶ The recorded copy is of such exceptional quality the user will no longer have a need to purchase the actual copyrighted album. One person can distribute a full-length album to more than 50 million Internet users in a matter of minutes. In 1991, it took twelve counterfeiting operations, which employed hundreds of people, to manufacture approximately twenty-eight million counterfeit cassette tapes.⁵⁷ Today it only takes one person with Internet access to accomplish all this. With the development of new high-speed cable modems and Internet connections the time it takes to download an album will continue to decrease. This technology will create a higher likelihood of downloading albums because it will not take as much time to do and the needed equipment will be more prevalent in average American homes.⁵⁸

52. *Id.*

53. *Id.* Record companies rely on the success of popular music groups to cover the losses that are incurred in producing less popular albums. If piracy continues, the profit that recording companies make from successful, popular albums will decrease since the number of albums sold will decrease; therefore, the record companies will not have enough profits to record musicians or groups that can not guarantee a successful album.

54. *Id.*

55. *Id.*

56. 143 Cong. Rec. H9883-01, H9884. (Daily Ed. Nov. 4, 1997) (Statement of North Carolina Representative Howard Coble).

57. *Id.*

58. *Id.*

Internet users can easily find music that has been pirated by using a search engine such as Yahoo or Webcrawler.⁵⁹ “Pearl Jam Online” is just one example of these sites.⁶⁰ On this site Pearl Jam fans can listen to concerts and watch television appearances that have been illegally posted. Another example is “Pearl Jam-The Present Tense.”⁶¹ A visitor of this site can listen to and download entire albums, including Pearl Jam’s latest album, “Single Video Theory,” released August 14, 1998. This site has had almost two million visitors. Since so many people are visiting this site and downloading music has become easier and faster, it seems logical that the desire to purchase albums will decrease; thus, decreasing recording company profits.

A new technological invention is increasing the need to stop Internet piracy. This new invention is called “Rio.”⁶² Rio is a new portable music recorder/player that records songs from the Internet

59. The author searched the title “Pearl Jam” on Yahoo to see how easy it really was to find pirated music on the Internet. Hundreds of sites were found; however, the author looked only at three of the first twenty that were displayed. Each of the those three sites contains pirated music.

60. Pearl Jam Online. (visited 10/31/98) <<http://www.jayd.com/pearljam/>>. The site specifies that it is “a free service to the fans of Pearl Jam” and that it is “not affiliated with Pearl Jam or Ten Club.” This site also contains a link to a page entitled “Legal Notes” which states the following: “This page is basically meant for Sony, Epic, Pearl Jam, or their management. To whom it may concern: As far as I know there has been no legislation on the rebroadcast of live concerts, radio broadcasts of concerts, or television appearances on the Internet. I have developed this because there are many Pearl Jam fans all over the world who would like to hear Pearl Jam live. But we all know that Pearl Jam can’t make it everywhere in the world. This web site will be dedicated to providing, free of charge, Pearl Jam concert and appearances in Real Audio and Video...that is until Sony, Epic, or Pearl Jam objects to this site. Any objections to this site can be emailed to webster@csus.edu.”

61. Pearl Jam-The Present Tense (visited 10/31/98) <<http://www.geocities.com/broadway/3476/pearljam.html>>. This site also provides the visitor will access to a program that can be used to listen to the music posted on the site. The author of this article was the 1,997,473 visitor to this site.

62. Chris Stamper, *Blame It On Rio*, ABCNEWS.com., Oct. 16, 1998. (visited 10/30/98) <<http://WWW.abcnews.com/sections/tech/Dailynews/rio981016.html>>

and allows the user to play them back.⁶³ This new device acts like a walkman. It is the size of a pager and plays for twelve hours on one “AA” battery.⁶⁴ Rio costs less than \$200, making it easily accessible to Internet users.⁶⁵ If Internet piracy is not controlled and Rio is marketed in stores,⁶⁶ the need to actually purchase copyrighted albums from stores will cease to exist. People who own Rio can record any album they choose right from the Internet free of cost.

The motion picture industry has not been hit by Internet piracy as much as the music industry but this is rapidly changing due to new technologies and faster cables.⁶⁷ The only advantage the music industry presently has over Internet piracy is the long length of time required to upload and download movies. This will change in the near future due to the advancement of technology.⁶⁸ Many people use the Internet to gain access to WebPages of their favorite actor, rock band, or motion picture movie.⁶⁹ Such pages often contain copyrighted material that is used without authorization. For example, Viacom Inc., the company that owns the right to Star Trek, found hundreds of sites that had illegally reproduced copyrighted film clips, sounds, and insignia.⁷⁰ Viacom sent notices to the webmasters of these sites ordering them to stop using the material without permission.⁷¹ Consequently, when fans logged in to their favorite Star Trek WebPage all they found was the letter sent by Viacom.⁷² With the passage of the NET Act, Viacom has

63. *Id.*

64. *Id.*

65. *Id.*

66. Chris Stamper, *The Record Industry Association of America Wants an Injunction Stopping the Distribution of The Player*. (visited 10/30/98) <<http://WWW.abcnews.com/sections/tech/Dailynews/rio981016.html>> .

67. *Copyrights: House Subcommittee Considers Criminal Penalties for Electronic Piracy*, BNA PATENT, TRADEMARK, & COPYRIGHT LAW DAILY, Sept 15, 1997, at 9.

68. *Id.*

69. Larry Lange, *Copyright Fight Rocks Net*, ELECTRONIC ENGINEERING TIMES, Feb. 25, 1998, at 16.

70. *Id.* at 2

71. *Id.* at 1

72. *Id.*

an avenue to have the makers of the web pages criminally prosecuted.⁷³

Because music and other copyrighted material can be pirated so easily and the economic implications to those industries are so great, more protection needs to be given to copyright owners.

II. THE LEGISLATION

In response to the aforementioned problems, Senator Patrick Leahy (D-VT) and Representative Bob Goodlatte (R-VA) introduced to Congress, in July 1997, the NET Act.⁷⁴ The purpose of the NET Act is to tighten the existing laws for copyright infringement through the Internet.⁷⁵ President Clinton signed this bill into law on December 16, 1997.⁷⁶ The NET Act makes a series of amendments to Title 17 and 18 of the United States Code.

A. Financial Gain Is No Longer A Requirement

The NET Act defined "financial gain" to include "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."⁷⁷ The statute of limitation under the provisions of Title 17 in criminal proceedings was extended from three to five years.⁷⁸ In Civil actions, the statute remains three years.⁷⁹

Before the passage of the NET Act, 17 U.S.C. § 506 stated that "any person who infringes a copyright willfully and for purposes of commercial advantage or private financial gain shall be punished as provided in 18 U.S.C. § 2319."⁸⁰ The NET Act added

73. There can only be criminal prosecution if the retail value of the copyrighted material has, at least, a total retail value of \$1000. 17 U.S.C. § 506 (a).

74. *Bill Introduced to the Copyright Loophole*. 9 NO. 8 J. Proprietary Rts. 24 (1997).

75. *Id.*

76. Richard Raysman, Peter Brown, *Internet Copyright Developments*, 3 SOFTWARE L. BULL. 82 (1998), at 2.

77. 17 U.S.C. § 101 (1997).

78. 17 U.S.C. § 507 (1997).

79. 17 U.S.C. § 507(b) (1997).

80. Criminal Offenses. (a) Criminal infringement-Any person who infringes a copyright willfully either (1) for purposes of commercial advantage or private

to that “the reproduction or distribution, including by electronic means, during any 180-day period, of one or more copies of one or more copyrighted works having a total retail value of more than \$1000.”⁸¹ The NET Act also limited willful infringement by adding that evidence of reproduction or distribution alone will not be sufficient to establish willful infringement.⁸² This limitation was included so that “prosecutions based solely on [reproduction or distribution] will not be pursued.”⁸³ Representative Coble stated in his testimony before the House of Representatives that “the willfulness standard should be satisfied if there is adequate proof that the defendant acted with reckless disregard of the rights of the copyright holder.”

B. The New Penalties

A person who commits an offense under 17 U.S.C. § 506(a)(2) “shall be imprisoned not more than three years, or fined in the amount set forth in this title, or both if the offense consists of the reproduction or distribution of 10 or more copies or phonorecords of 1 or more copyrighted works, which have a retail value of \$2500 or more.”⁸⁴ For a second offense the punishment is imprisonment for not more than six years, fined, or both.⁸⁵ If the reproduction or distribution is of only one or more copies of one or more copyrighted works with a retail value of \$1000 or more, one shall be imprisoned not more than one year or fined or both.⁸⁶ The

financial gain, or (2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copyrighted works, which have a total retail value of more than \$1000, shall be punished as provided For purposes of a copyrighted work, by itself, shall not be sufficient to establish willful infringement. 17 U.S.C. § 506 (1997).

81. 17 U.S.C. § 506(a)(2).

82. “For purposes of this subsection evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.” 17 U.S.C. § 506(a).

83. 143 Cong. Rec. H9883-01, H9884. (Daily Ed. Nov. 4, 1997) (Statement of North Carolina Representative Howard Coble).

84. 18 U.S.C § 2319(c)(1) (1997).

85. 18 U.S.C. § 2319 (c)(2).

86. 18 U.S.C. § 2319(c)(3).

punishment for a violation under 17 U.S.C. § 506(a)(1) remained unchanged.⁸⁷

The NET Act also provides for victims to submit a victim impact statement that identifies the victim and the extent of the injury and loss suffered, including the estimated economic impact.⁸⁸ People allowed to submit an impact statement include producers and sellers of legitimate works affected, holders of intellectual property rights in such works, and the legal representative of the producers, sellers and holders.⁸⁹

III. THE EFFECT OF THE NET ACT

The implications of the NET Act are difficult to determine.⁹⁰ From an intellectual property point of view the NET Act is positive legislation that will aid in the protection of copyright holders.⁹¹ Despite all the support for the NET Act, there are some that oppose it. However, the positive effects far outweigh the negative.

A. Is there a need for the NET Act?

The opposition believes that there is not a need for the NET Act.⁹² Copyright holders already have remedies available to them through the Copyright Act in the event of an infringement.⁹³

87. The punishment for committing an offense under § 506(a)(1) "shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution including by electronic means, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than \$2,500." 18 U.S.C. § 2319 (b)(1). For a second offense one can be imprisoned for not more than 10 years, fined, or both. 18 U.S.C. § 2319 (b)(2).

88. 18 U.S.C. § 2319(d), § 2319A, and § 2320 (1997).

89. 18 U.S.C. § 2319 (d), § 2319A(d) and § 2320.

90. As of 11/16/98 no court has interpreted the NET Act.

91. "Witnesses from the computer software industry, on-line service providers, and the recording and motion picture industry unanimously endorsed" the NET Act. *Copyrights: House Subcommittee Considers Criminal Penalties for Electronic Piracy*, BNA PATENT, TRADEMARK, & COPYRIGHT LAW DAILY, Sept. 15, 1997.

92. David Loundy, *E-Law: Congress' Digital Copyright Conundrums*, 2 CYBERSPACE LAW 21, No. 11 at 20.

Moreover, the government will now bear the costs of prosecution.⁹⁴ The end result is more spending of taxpayer dollars.

However, this argument fails in several respects. The threat of criminal prosecution will deter potential pirates more than a civil action would.⁹⁵ In addition, if the copyright holders are sharing the costs of investigating potential pirates with the federal government the copyright holders could experience less of a loss. In turn, this could mean lower prices for consumers.⁹⁶

B. Will the NET Act cause an increase in prices?

People who oppose the NET Act also argue that because the retail value of the copyrighted material must be at least \$1000 to be criminally prosecuted⁹⁷ that this financial requirement will encourage an increase in retail prices in order to make obtaining the minimum dollar amount required for prosecution easier.⁹⁸ If the price of a program is \$50.00, for example, to fall under the NET Act one would have to distribute at least twenty copies. However, if the price is raised to \$100.00 only ten copies would need to be made to become criminally liable.⁹⁹ Consequently, consumers will have to pay more money for software so that it is easier to prosecute copyright infringes under the NET Act.

This argument also fails. The NET Act was passed in response to the high level of netlifting that is occurring today.¹⁰⁰ When netlifting occurs the number of users who download the

94. *Id.*

95. *Copyrights: House Subcommittee Considers Criminal Penalties for Electronic Piracy*, BNA PATENT, TRADEMARK, & COPYRIGHT LAW DAILY, Sept 15, 1997, at 8.

96. *Id.*

97. 17 U.S.C. § 506(a).

98. David Loundy, *E-Law: Congress' Digital Copyright Conundrums*, 2 CYBERSPACE LAW 21, No. 11, at 20.

99. This example is to illustrate that the value of the copyrighted work is multiplied by the number of copies distributed to reach the minimum value amount required under the NET Act for prosecution.

100. *No Electronic Theft Act: Hearings on HR 2265 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, Sept. 11, 1997. (Statement of Sandra Sellers, Vice President for Intellectual Property Education and Enforcement, Software Publishers Association).

copyrighted material are usually substantially large,¹⁰¹ consequently, there is no need to raise retail prices to reach the financial requirement. This figure will be easily obtainable.

C. What about the Fair Use Doctrine?

The Association for Computing, a leading group of scientists, wrote the President in opposition to the NET Act. Some scientists believe that this act will unintentionally criminalize scientific publication and limit the fair use doctrine because scientists often send copyrighted material to their peers for consultation.¹⁰² The Association for Computing questions whether too much emphasis was put on fixing the piracy problem and not on the effects of the act.¹⁰³ One of the largest concerns is that university faculty members will refrain from posting scientific papers on the Internet due to a fear of prosecution.¹⁰⁴ By not sharing this information the educational process could be hindered, along with the advancement of technology.¹⁰⁵

This concern is unwarranted. The legislative history reflects that a school's actions would not be 'willful' if the user believes in good faith that the copying of the material is permissible as "fair use" under the Copyright Act.¹⁰⁶ The "Fair Use Doctrine"¹⁰⁷ provides for the use of copyrighted work for purposes such as "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."¹⁰⁸

101. Ira Rothken, *Are you a Software Pirate?* HOME OFFICE COMPUTING (July 1, 1998), at 122.

102. Larry Lange, *Copyright Fight Rocks Net*, ELECTRONIC ENGINEERING TIMES, Feb. 25, 1998, at 19.

103. Loren Gelman, the Associate Director of the U.S. Public Policy Office of the Association of Computing, quoted in *Editorial & Comments*, THE COLUMBUS DISPATCH, Dec. 27, 1997.

104. *Id.*

105. *Id.*

106. *Copyrights: House Subcommittee Considers Criminal Penalties for Electronic Piracy*, BNA PATENT, TRADEMARK & COPYRIGHT LAW DAILY, Sept. 15, 1997.

107. 17 U.S.C. § 107 (1997)

108. "Limitations on Exclusive Rights: Fair Use. Notwithstanding the provision of section 106 & 106(A), the fair use of a copyrighted work, including

The NET Act does not limit the fair use doctrine, which includes the use of copyrighted materials for educational purposes.¹⁰⁹ In order to be criminally prosecuted for copyright infringement one must act with knowledge and purpose of violating the law.¹¹⁰ Mistake, accident, or good faith will not meet the willfulness standard set forth in the statute.¹¹¹ Therefore, professors can distribute copyrighted material to their students or post their work on the Internet for peer review without worrying about being criminally prosecuted, as long as they acted in good faith.¹¹²

D. How will the NET Act effect juveniles?

Another problem with prosecuting the NET Act is that federal investigators may find themselves arresting juveniles with whom they are not accustomed to dealing.¹¹³ The children who commit computer crimes are “generally well-educated, upper-middle class, with computers at home and endless time to spend on them.”¹¹⁴ The juvenile who commits computer crimes is not one “who

such use by reproduction in copies or phonorecords or by an other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include- (1) the purpose & character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount & substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” 17 U.S.C. § 107 (1997).

109. Bob Goodlatte, *Crack Down on Pirates*, USA TODAY, Dec 2, 1997.

110. *Id.*

111. *Id.*

112. *Copyrights: House Subcommittee Considers Criminal Penalties for Electronic Piracy*, BNA PATENT, TRADEMARK & COPYRIGHTS LAW DAILY, Sept. 15, 1997.

113. Karen Leibowitz, *Kid Stuff. Judges Having Hard Time with Computer Crime, Sentencing Standards Aren't Clear-Cut*, NATL. L. J., July 6, 1998, at A1 (Col. 1).

114. *Id.* (quoting David E. Green, deputy chief of the U.S. Department of Justice's Computer Crime and Intellectual Property Section).

ordinarily get[s] in trouble with the law.”¹¹⁵ However, “now that juveniles are involved, the criminal justice system faces the difficult challenge of trying to punish and deter offenders without destroying the possibly bright futures of talented youngsters.”¹¹⁶

In response to this argument, Boston criminal defense attorney Harvey Silverglate, co-counsel for David LaMacchia, stated that “if defendants are students or teenagers committing computer crimes for ‘bragging rights,’ sentences are usually not heavy.”¹¹⁷ Consequently, most of the sentences that the juveniles receive will probably be rather light due to the fact that the judge may view the offense with less seriousness as long as the physical damages are not substantial.¹¹⁸ Since most juveniles do not understand the consequences of their actions when they pirate computer games, software and music recordings, they will not be prosecuted under the NET Act at all because they did not act willfully.

E. How will this effect users who softlift?

Some people who oppose the NET Act feel that it will unduly punish the occasional softlifter.¹¹⁹ This, however, is not the case. Minor infringements, such as giving a copy of computer software to a sibling or friend will not be prosecuted under the NET Act.¹²⁰ This is most likely because such actions are not worth the time and effort of the federal prosecutor, and because the dollar figures involved are minimal.¹²¹ Reaching the willfulness standard may also become a problem for the prosecutor. Moreover, since this type of copyright infringement is usually limited to small numbers of people and is not uploaded onto the Internet, detection will prove to be extremely difficult.¹²² However, if the softlifter

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Copyrights: House Subcommittee Considers Criminal Penalties for Electronic Piracy*, BNA PATENT, TRADEMARK, & COPYRIGHT LAW DAILY, Sept 15, 1997, at 13.

120. Richard Raysman and Peter Brown, *Internet Copyright Developments*, 3 SOFTWARE L. BULL. 82 (1998), at 3.

121. *Id.*

122. *Id.*

distributed a large number of copies, similar to the situation the federal government has in the Army,¹²³ the NET Act would be applicable and federal charges would be brought against the infringing personnel.

CONCLUSION

Associates from the computer software industry, on-line service providers, and the recording and motion picture industry fully support the NET Act.¹²⁴ Stopping piracy of all kinds, but especially over the Internet, needs to be a top priority. The NET Act is the first step. Once prosecutions under the NET Act become more commonplace, the startling statistics mentioned in this article will begin to decrease. People need to respect the rights of others. Internet piracy, like shoplifting, is a crime. If a person takes an item that does not belong to him, he runs the risk of going to jail or paying a large fine. The Internet is a wonderful resource of information; there is no need to tarnish a good thing by infringing on another's copyrighted work.

Stephanie Brown

123. Pietrucha, *supra* note 35-37, at 5.