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CRS Report for Congress

Criminal Copyright Infringement: Proposal to Impose Criminal Liability on Nonprofit Infringers and Felony Liability for Transmissions

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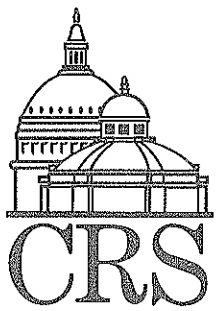

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CRIMINAL COPYRIGHT INFRINGEMENT: PROPOSAL TO IMPOSE CRIMINAL LIABILITY ON NONPROFIT INFRINGERS AND FELONY LIABILITY FOR TRANSMISSIONS

SUMMARY

For most of its nearly 100 year history, criminal copyright infringement has been a misdemeanor offense. A felony offense was added in 1974 for second offenses relating to sound recording piracy. Congress extended the felony offense to motion picture piracy in 1978, and in 1982 both substantially increased the maximum fine and subjected certain first offenders to felony charges for record or motion picture piracy. Not until 1992, did Congress decide that felony prosecution should apply to works other than sound recordings and motion pictures.

Traditionally, the rights conferred on copyright owners have been enforced by the rightsholders in civil infringement suits. The civil remedies of United States copyright law are strong, including statutory damages up to $20,000 for each work infringed and up to $100,000 per work if the infringement is willful.

Congress hesitated long before imposing felony sanctions on copyright infringement because of concerns about the intangible nature of the property right; the potential use of copyright as a means of censorship; tension between the First Amendment and rights under copyright law; and the relative lack of public understanding of the intricacies of copyright liability.

The existing *mens rea* standard for criminal copyright infringement requires proof beyond a reasonable doubt that the infringer acted "willfully and for purposes of commercial advantage or private financial gain." This standard has been applied to criminal copyright infringement since 1897.

A pending bill, S.1122, proposes to change the *mens rea* standard. It would extend criminal liability to nonprofit infringers if the retail value of the work(s) infringed is $5000 or more. The bill also lengthens the statute of limitations on criminal prosecutions from three to five years, revises the statutory thresholds for distinguishing between misdemeanor and felony offenses, and makes an infringing transmission a felony offense for the first time.

Proponents of S. 1122 argue that criminal penalties are necessary to control the potential for massive copying in the digital world and cyberspace. Opponents argue that civil remedies are more than adequate to deter economically damaging copying. They oppose criminalizing nonprofit activity that has been noncriminal throughout United States copyright history.

This report reviews briefly the history of criminal remedies for copyright infringement, summarizes the existing law, analyzes the pending legislation, and notes arguments for and against the proposed amendments.

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CRIMINAL COPYRIGHT INFRINGEMENT: PROPOSAL TO IMPOSE CRIMINAL LIABILITY ON NONPROFIT INFRINGERS AND FELONY LIABILITY FOR TRANSMISSIONS

The existing *mens rea* standard for criminal copyright infringement requires proof beyond a reasonable doubt that the infringer acted "willfully and for purposes of commercial advantage or private financial gain."[1] This standard has been applied to criminal copyright prosecutions since 1897.[2]

A bill pending in Congress (S. 1122) would amend this *mens rea* standard to subject nonprofit infringers and "barter/exchange for value" infringers to criminal copyright liability for the first time. The bill also imposes felony liability for transmissions of copyrighted works for the first time (if certain statutory thresholds are met), increases the statute of limitations for criminal copyright prosecution from three to five years, and otherwise makes felony prosecution easier by modifying the statutory thresholds.

This report reviews briefly the history of criminal penalties for copyright infringement, summarizes the existing law, analyzes the pending legislative proposal, and notes arguments for and against the legislation.

CRIMINAL COPYRIGHT INFRINGEMENT HISTORY

Traditionally, the rights conferred on copyright owners have been enforced by the rightsholders in civil infringement suits. The existing penalties for civil

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[1]Section 506(a), title 17 of the United States Code, the Copyright Act of 1976.

[2]Act of January 6, 1897, 29 Stat. 481.

copyright infringement are strong[3] and provide as many remedies as, or greater remedies than, those found in the copyright laws of other countries.

Criminal Penalties 1897-1974

Criminal penalties for copyright infringement were added to the copyright law in 1897, but originally applied only to violation of the public performance right in musical and dramatic works.[4] The 1897 Act also established the mens rea standard that has not been substantively changed since then: the government must prove that the infringer acted "willfully" and "for profit." "Willfully" has never been defined in the copyright statutes. The "for profit" element is now expressed in the phrase "for purposes of commercial advantage or private financial gain," and is also undefined in the statute.

Until the advent of audio and video taping technology in the 1960s and 1970s, criminal prosecutions for copyright infringement were exceedingly rare.

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[3]Unlike the criminal provisions, it is not necessary to prove willfulness or a for-profit motive for civil infringement. Civil remedies apply in case of "unconscious" or "innocent" infringement, although the penalties may be diminished for "innocent" infringers. Vicarious and contributory infringers are also liable. The civil remedies include an injunction, actual damages and the infringer's profits, or in lieu of actual damages and profits at the option of the copyright owner, statutory damages. The statutory damages ordinarily range from $500 to $20,000 for each work infringed, as the court considers just. If the infringement is willful, the statutory damages limit is increased to $100,000 for each work. The court may reduce the award to $200 for "innocent" infringers and may even remit damages for nonprofit educational users who acted under a reasonable belief the fair use defense applied to their copying activities. Infringing articles, copies, or phonorecords are subject to seizure and forfeiture. 17 U.S.C. §§ 501-505; 509. A prevailing copyright owner in an infringement suit may be awarded costs and attorney's fees, if the work infringed was timely registered with the Copyright Office. 17 U.S.C. §§ 412 and 505.

[4]The main purpose of the Act of January 6, 1897 was to grant copyright owners of musical compositions a public performance right for the first time. A public performance right for dramatic works had been granted more than 40 years earlier by the Act of August 18, 1856. The civil damages remedy of the 1856 Act was extended in the 1897 Act to musical compositions: $100 for the first infringing public performance for profit and $50 for second and subsequent infringements. When the public performance right was granted to musical compositions, the performing rights societies later created to enforce this right did not exist. For example, the American Society of Composers, Authors, and Publishers ("ASCAP") was established in 1914. The public performance right in musical works is much more difficult to administer and enforce than the comparable right in dramatic works. In the absence of a collective mechanism to enforce the music performance right, its advocates successful petitioned the Congress to add the first criminal remedy for copyright infringement.

Even in the case of second or subsequent offenders, or damages involving hundreds of thousands of dollars, the maximum, general penalties before 1974 were a fine up to $1000 or one year in prison, or both. Any criminal copyright infringement could be punished only as a misdemeanor before 1974.

Criminal Penalties 1974-1992

In the 1970s, Congress perceived that commercial piracy of records and motion pictures could not be controlled simply by civil remedies and misdemeanor penalties. Congress recognized that "record piracy is so profitable that ordinary penalties fail to deter prospective offenders."[5] In 1974, the maximum fine for criminal infringement of recordings alone was increased to $25,000 for first offenders and $50,000 for second offenders. Also, for the first time ever in copyright law, felony charges could be brought against second offenders of sound recording copyrights.[6]

In the Copyright Act of 1976, a general revision of the copyright law,[7] Congress extended the increased penalties for record piracy to commercial piracy of motion pictures. For works other than sound recordings and motion pictures, the offense of criminal copyright infringement remained a misdemeanor, although the maximum general fine was increased from $1000 to $10,000.

The 1976 Copyright Act went into effect on January 1, 1978. Within just a few years, motion picture and sound recording copyright owners petitioned Congress to increase the criminal penalties once again. Congress responded with the Piracy and Counterfeiting Amendments Act of 1982.[8] Although the maximum fines were increased for all copyrighted works, the most significant changes were limited to sound recordings and motion pictures. For the first time in United States copyright law, certain *first* offenders faced felony prosecution.

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[5]H.R. REP. 93-1581, 93rd Cong., 2d. Sess. 4 (1974).

[6]Act of December 31, 1974, Pub. L. 93-573, 88 Stat. 1873 (up to two years in prison for second offenders). This Act, in addition to increasing the penalties for record piracy, made sound recording copyright protection permanent. Copyright had been granted to sound recordings in the Sound Recording Act of 1971, effective February 15, 1972. Act of October 15, 1971, Pub. L. 92-140, 85 Stat. 391. The 1971 Act was subject to a sunset provision, effective January 1, 1975. The 1971 Act had extended criminal liability for violation of the mechanical reproduction license of §1(e) of the Copyright Act of 1909, 33 Stat. 1075, but merely made applicable the misdemeanor penalty and $1000 maximum fine.

[7]Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541, codified at title 17 U.S. Code §§101-803.

[8]Act of May 24, 1982, Pub. L. 97-180, 96 Stat. 91, 93.

Under the 1982 Act, the general maximum fine was increased from $10,000 to $25,000 for first and subsequent offenses involving any copyrighted work other than a sound recording or motion picture. First and subsequent offenses remained punishable only as misdemeanors for works other than sound recordings and motion pictures.

In the case of record and film piracy, the 1982 Act created three penalty categories based upon new statutory thresholds. If the offense involved multiple copying/distribution, within a 180-day period, of 1000 or more phonorecords of sound recordings, or 65 or more copies of motion pictures, the maximum fine was $250,000, or five years, or both, even for a first offender. These penalties also applied to any second or subsequent offense for record or film piracy. If the multiple copying/distribution activity within a 180-day period fell between 101-999 phonorecords, or 8-64 copies of motion pictures, for a first offense the penalties were a maximum $250,000 fine, two years, or both. First offenses involving less than 101 phonorecords, or less than 8 copies of motion pictures, or copying/distribution activity that fell outside the 180-day range, were subject to the general penalties applied to other works -- $25,000 fine, one year in prison, or both.

The heightened penalties for record and film piracy applied only to infringement of the reproduction or distributions rights. They did not apply to infringement of the adaptation right, or in the case of motion pictures, of the public performance and public display rights. Criminal infringement of these rights was subject to the $25,000 fine and misdemeanor penalty. In actuality, criminal prosecutions have not been attempted for decades for infringement of rights other than the reproduction and distribution rights.

Finally, the 1982 Act made a structural change in criminal copyright law. The Act moved the criminal penalties to title 18 U.S.C. -- the Criminal Code -- in a new section 2319. The criminal offense and the mens rea standard, however, continued to be set by section 506(a) of title 17 U.S.C. -- the Copyright Code.[9]

EXISTING CRIMINAL INFRINGEMENT PENALTIES

Summary

The existing criminal penalties for copyright infringement were legislated in a 1992 Amendment of 18 U.S.C. §2319 described simply as the "Criminal

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[9]This migration of the criminal penalties for copyright infringement to title 18 was done for the purpose of highlighting the serious nature of the crimes of record and motion picture piracy. It was also hoped that federal prosecutors and judges, accustomed to working with title 18 offenses, would be more likely to treat the copyright infringement offense more seriously, if it were part of the Criminal Code.

Penalties for Copyright Infringement."[10] Some refer to the Amendment as the "Copyright Felony Act," since for the first time infringement of works other than sound recordings and motion pictures became a felony offense.

The Amendment also effected a ten-fold increase in the maximum general fine for individual infringers of works other than sound recordings and motion pictures (from $25,000 to $250,000) and a ten-fold increase in the possible prison sentence (from one year to 10 years).

The 1992 Amendment established new statutory thresholds to distinguish misdemeanor and felony offenses. If fewer than 10 copies/phonorecords are involved in a first offense, or the retail value of the copies/phonorecords are $2500 or less, or the 180-day criterion is not met, maximum penalties are a fine up to $250,000 for an individual and $500,000 for a corporate offender, or one year, or both. The offense is then a misdemeanor.

If 10 or more copies/phonorecords, having an aggregate retail value of more than $2500, are reproduced/distributed within a 180-day period, a first offender is subject to the same fines described above, but the offense becomes a felony. The offender may be sentenced up to five years in prison, fined, or both. For a second or subsequent offense meeting these statutory thresholds, the offense is a felony. The same fines apply, but the maximum prison sentence can be 10 years.

As under the pre-1992 law, criminal infringements of rights other than the reproduction and distribution rights are subject to the misdemeanor penalty (i.e., one year in prison). The new increased fines apply, however.

Legislative History

Although public hearings were conducted on a bill to extend the felony provisions of the 1982 Act to computer software piracy, extension of the felony provisions to works other than sound recordings, motion pictures, and computer programs was not publicly debated.

The original proposal, S. 893, 102d Congress, First Session (1991), as passed by the Senate in June 1992 only applied the 1982 Act's penalties for record and film piracy to computer programs. No bill was pending in the House of Representatives. After the House Subcommittee on Intellectual Property and Judicial Administration held public hearings on S. 893, the House Judiciary Committee, on recommendation of the Intellectual Property Subcommittee, amended the Senate bill to "harmonize[] the felony provisions in section 2319 to apply to all types of copyrighted works, as is currently the case for misdemeanor violations."[11] The Senate acceded to the House substitute. For

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[10]Act of October 28, 1992, Pub. L. 102-561, 106 Stat. 4233.

[11]H.R. REP. 102-997, 102d Cong., 2d Sess. 4 (1992)

the first time, infringement of literary, musical, dramatic, graphic and visual arts works became subject to possible felony prosecution.

Before 1992, Congress had refrained from using felony penalties against copyright infringers other than record or film pirates. As the Supreme Court observed in *Dowling v. United States*, 473 U.S. 207 (1985), "Congress hesitated long before imposing felony sanctions on copyright infringers." 473 U.S. at 225. Congressional concerns primarily focused on the intangible nature of the copyright interest; the potential use of copyright as a means of censorship; tensions between the First Amendment and rights under copyright; and the relative lack of public understanding of the intricacies of copyright infringement.

When Congress legislated a copyright felony offense in 1974 and 1978, "it carefully chose those areas of infringement that required severe response -- specifically sound recordings and motion pictures -- and studiously graded penalties even in those areas of heightened concern." 473 U.S. at 225.

In 1992, Congress abandoned a piecemeal, calibrated approach to felony copyright infringement in favor of harmonization of the criminal penalties.

Mens Rea Standard

The statutory thresholds of existing law continue to insulate less substantial copying/distribution activities from felony prosecution.
Arguably, however, the $2500 retail limit on misdemeanors is reached easily in today's marketplace. On the other hand, all offenses infringing exclusive rights other than the rights of reproduction and distribution are misdemeanors.

The principal limit of existing law on the scope of criminal liability, however, rests upon the *mens rea* standard. To be subject to criminal liability, the infringer[12] must act willfully and for purposes of commercial advantage or private financial gain, i.e. "for profit."

Willfulness

The Copyright Act does not define "willful." The Supreme Court has never defined the term in the context of the Copyright Act, although it has elaborated on the term as applied in other criminal contexts.

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[12]Conviction of criminal infringement requires proof beyond a reasonable doubt of those statutory elements that constitute civil infringement: subsistence of a valid copyright and unlawful copying by the defendant. Civil infringement principles are used to establish these elements in a criminal case, but the prosecution must meet the higher burden of proof required for criminal liability.

Some assert that a "split" exists among the Circuit Courts of Appeal about the meaning of "willful" in criminal copyright infringement.[13] According to one commentator: "The majority of courts have said that the language of the Copyright Act makes criminal copyright infringement a 'specific' intent crime; in other words, a prosecutor must show that the accused specifically intended to violate the copyright law."[14]

The *minority* view seems to be that "willful" means an intentional, voluntary doing of an act that violates the copyright statute, without specific knowledge that the act is a copyright infringement.[15]

The Courts of Appeal do not, however, themselves acknowledge the existence of a "split." *United States v. Moran,* 757 F. Supp. 1046, 1049 (D. Neb. 1991). The paucity of copyright criminal cases makes it difficult to reach a firm conclusion on the existence of a "split."

Cases decided under the 1976 Copyright Act, uniformly seem to fall within the "majority" view, which requires proof of specific intent to infringe. *United States v. Cross,* 816 F.2d 297, 300 (7th Cir. 1987) (defendant knowingly and voluntarily violated the copyright laws); *United States v. Moran,* 757 F. Supp. 1046, 1050 (D. Neb. 1991) (defendant not guilty because he lacked requisite specific intent -- that is, voluntary, intentional violation of a known legal duty).

Even the cases decided under the 1909 Copyright Act in the 1970s, seem to adhere to the specific intent interpretation. In one of the first convictions for record piracy, *United States v. Heilman,* 614 F.2d 1133 (7th Cir. 1980), the court applied the specific intent standard of *United States v. Murdock,* 290 U.S. 389, 394-95 (1933). It upheld the conviction because defendant "chose to persist in the conduct which he knew had 'a high likelihood of being held by a court of competent jurisdiction to be a violation of a criminal statute.'" 614 F.2d at 1138.

In *United States v. Wise,* 550 F.2d 1180 (9th Cir. 1977), the Ninth Circuit upheld the conviction of a film collector who had intentionally and knowingly sold unauthorized copies of films to "friends." The district court had earlier

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[13]Saunders, *Criminal Copyright Infringement and the Copyright Felony Act,* 71 DENVER UNIV. L. REV. 671, 688 (1994).

[14]*Ibid. See also, United States v. Moran,* 757 F. Supp. 1046, 1049 (D. Neb. 1991). M. NIMMM. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT, §15.01[C] at 15-10, n. 13 (1995).

[15]Saunders, *ibid.*, attributes this minority view to the Second and Ninth Circuits. As discussed later in this report, this observation does not seem warranted by the more recent cases in those circuits. The opinion may rest upon two pre-1945 cases, one in each circuit, that may imply an intent to copy establishes willfulness. *United States v. Backer,* 134 F.2d 533 (2d Cir. 1943) and *Marx v. United States,* 96 Fed. 204 (9th Cir. 1938).

found that defendant "knew what he was doing and did it with a bad purpose to disobey the law or disregard the law, and that he had the specific intent."[16]

One of the earliest criminal copyright cases from the Second Circuit implies, however, that intent to copy a copyrighted work might satisfy the willfulness standard. In a highly unusual criminal prosecution of someone who copied the designs of two related statues or figurines, the Second Circuit upheld a criminal conviction on the basis that the defendant "deliberately had the copies made and deliberately sold them for profit." *United States v. Backer,* 134 F.2d 533 (2d Cir. 1943). Although the court did not mention a specific intent requirement, it is clear from the facts of the case that the defendant had knowledge of the copyright law, instructed his manufacturer to adapt the copies enough to avoid copyright infringement, but otherwise intended to copy designs the defendant knew were copyrighted.

In probably the strangest criminal copyright infringement case, two of the Marx Brothers (Groucho and Chico) were convicted of infringing and aiding and abetting the infringement of copyright in a dramatic composition (a radio script). *Marx v. United States,* 96 F. 2d 204 (9th Cir. 1938). An indictment was upheld that merely charged willful infringement by intentional copying. Evidence that the Marx Brothers met with the author one year before the infringing broadcast, discussed use of the script in a radio broadcast, and knew the script was copyrighted was sufficient to prove willfulness.

The *Marx* case appears to be an aberration. The proof adduced to establish "willful" infringement is the kind of proof normally submitted to prove ordinary civil infringement. This case does not represent the law of the Ninth Circuit now. Cases like *Wise, Drebin*, and *Atherton* -- all decided towards the end of the 1909 Copyright Act -- require specific intent to infringe.

The Government argued for the lesser "deliberate intent to copy" standard in *United States v. Moran,* 757 F. Supp. 1046, 1048 (1987) and was rebuffed.

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[16]550 F. 2d at 1194, fn. 27. *Accord, United States v. Drebin,* 557 F.2d 1316, 1324 (9th Cir. 1977) (overwhelming proof of willfulness in evidence defendants familiar with motion picture industry practices and copyright law and knew it was a Federal offense to copy motion picture prints); *United States v. Atherton,* 561 F. 2d 747, 752 (9th Cir. 1977) (willfulness established by proof defendant intentionally sold unauthorized motion picture prints and knew that these sales in violation of the copyright law were illegal); *United States v. Sherman,* 576 F. 2d 292, 297 (10th Cir. 1978) (proof of specific intent to infringe established by evidence defendant reproduced record tapes he knew were actual recorded performances of famous artists); *United States v. Whetzel,* 589 F. 2d 707 (D.C. Cir. 1978) (past infringements relevant to show knowledge of copyright law and intent to infringe); *United States v. Rose,* 149 U.S.P.Q. 820 (S.D.N.Y. 1966)(an act is done willfully if done voluntarily and purposely and with specific intent to do that which the law forbids -- that is, with bad purpose either to disobey or disregard the law).

Although *Moran* was a district court case, it seems to reflect at least the prevailing and perhaps consistent view under existing law.

To support its argument, the Government cited *United States v. Backer* (discussed above) and *United States v. Taxe,* 540 F.2d 961 (9th Cir. 1976). In *Taxe,* the court did not discuss willfulness other than to note the trial judge had instructed the jury that in determining willfulness it should consider the fact that defendant acted on counsel's advice that his planned copying of recordings was noninfringing. 540 F. 2d at 969. The court in this case was dealing with a prototypical record pirate who was found with 19,000 infringing recordings in his possession. He knew about the Sound Recording Act of 1971 (and the 1974 Act making sound recording copyright permanent). He attempted to circumvent the copyright law on advice of counsel by making minor technical adjustments and allegedly "re-recording" the sounds. He hoped thereby to argue he did not "duplicate" the "actual sounds" of the recordings he copied.[17] The court rejected these arguments and, in effect, found a specific intent to infringe.

In summary, the alleged interpretive "split" in the Courts of Appeal on the term "willful" in 17 U.S.C. §506(a) is not clearly discernible. Interpretation under the 1976 Copyright Act appears to require specific intent, that is, an intentional, voluntary violation of a known legal duty -- a deliberate intent to infringe the copyright and not merely a deliberate intent to copy. There are few decisions discussing willfulness, however; therefore, an interpretation that criminal copyright infringement requires specific intent may not be firmly established.

Purpose of Commercial Advantage

That an infringer must have a "for profit" motive to be prosecuted for criminal copyright infringement has essentially been part of the copyright law from the beginning of criminal infringement in 1897.

Congress made a slight language change effective January 1, 1978, which is embodied in existing law. The phrase "for purposes of commercial advantage or private financial gain" replaced the "for profit" terminology. The change does

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[17]The Sound Recording Act of 1971, 85 Stat. 391, extended a narrow reproduction right to sound recordings. The right was "limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sound fixed in the recording." That the right was limited to duplication of the actual sounds was emphasized by a proviso that specified that "this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording..." Section 1(f) of the Copyright Act of 1909, in effect on February 15, 1972. Richard Taxe and other "record pirates" attempted to evade civil and criminal liability by making minor changes in the course of "duplicating" recordings. The courts rejected these evasive tactics.

not appear to have substantitive significance,[18] but simply better reflects the case law interpretation of the "for profit" element. One need not "profit" from the infringement; one must simply make an attempt to profit, or have a hope that commercial gain will be realized from the infringement.[19]

Traditionally, a for-profit motive has been required to criminalize copyright infringement for two principal reasons: 1) To avoid subjecting teachers, professors, librarians, researchers, scholars, and other nonprofit users to the threat of criminal liability; and 2) to avoid the potentially chilling effect on free expression that exposure to criminal liability could have on nonprofit writers and publishers (e.g., university publications, symposia, professional society publications, etc.).

In *United States v. Steele,* 785 F.2d 743 (9th Cir. 1984), a film collector attempted to argue he had no motive of "commercial gain" but merely exchanged or swapped videotapes with "friends." The evidence showed sales of 20-25 copies to one "friend" and two copies to another for prices from $10-$80. This was sufficient evidence that defendant "was in a business for commercial or private financial gain." 785 F. 2d at 749.

The requisite "commercial/financial gain" motive can exist with respect to an employee who knowingly participates in a copyright infringing activity that is for the purpose of financial gain. *United States v. Cross,* 816 F.2d 297 (7th Cir. 1987) (chief clerk - resident female companion of co-owner of infringing video rental business has requisite commercial purpose).

Because prosecutors determined that he lacked the requisite "commercial purpose," criminal copyright charges were not filed against M.I.T. student David LaMacchia when he established an electronic bulletin board on the Internet and encouraged others to upload popular computer software for downloading by others. Instead, federal prosecutors attempted to convict LaMacchia under the wire fraud statute. 18 U.S.C. §1343. A district court judge dismissed this indictment, however, on grounds that the wire fraud statute does not reach copyright-related infringing conduct. *United States v. LaMacchia,* 871 F. Supp. 535 (D. Mass. 1994).

In an effort to provide criminal penalties against *LaMacchia*-type activities on the Internet and other computer networks, Senator Leahy has introduced a bill (S. 1122), which would effect major changes in criminal copyright liability.

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[18]*United States v. Moran,* 757 F. Supp. 1046, 1049-1050, fn. 2 (D. Neb. 1991).

[19]*United States v. Cross,* 816 F. 2d 297, 301 (7th Cir. 1987).

ANALYSIS OF S.1122

Summary

The pending bill proposes to change the *mens rea* standard for criminal copyright infringement and thereby extend criminal liability to new classes of users of copyrighted works, specifically nonprofit users and those who barter or exchange copyrighted works. It also lengthens the period for criminal prosecution by changing the statute of limitations, revises the statutory thresholds for distinguishing between misdemeanor and felony offenses, and makes an infringing transmission a felony offense for the first time.

The most important changes that S.1122 would effect in the scope of criminal copyright liability are:

* Criminal prosecution of nonprofit users of copyrighted works is made possible for the first time ever (if $5000 threshold is met)

* Criminal prosecution of users who barter/exchange copyrighted works is made possible apparently for the first time, without any minimum retail value for the goods

* Felony prosecution of nonprofit users of copyrighted works is made possible (if $10,000 threshold is met; no 180-day limit)

* Felony prosecution of users who barter/exchange copyrighted works is made possible (if statutory thresholds are met: 10 or more copies/phonorecordsreproduced/distributed/transmittedwithin180-day period, having a retail value of more than $5000)

* Felony prosecution is possible against someone who transmits, or assists others in reproducing/distributing copyrighted works (if statutory thresholds are met)[20]

* Statute of limitations for criminal prosecution increased from three to five years

* The statutory thresholds distinguishing between misdemeanor and felony offenses are revised; different standards are set for nonprofit infringers and "commercial purpose" infringers[21]

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[20]In the case of nonprofit infringers, the felony threshold is the $10,000 retail value, without any minimum number of infringing copies and without any time limit. In the case of "commercial purpose" infringers, the felony thresholds are the 10 copies or phonorecords within a 180-day period having a retail value of more than $5000.

[21]*Ibid.*

Discussion

1) Nonprofit infringers

The single most important and consequential change proposed in S. 1122 is modification of the *mens rea* standard to eliminate a "commercial purpose" as an *essential* element of criminal copyright infringement.

The change is effected by amending 17 U.S.C. §506(a) to create two copyright infringement offenses. One offense requires proof beyond a reasonable doubt of willful infringement for purposes of commercial advantage or private financial gain.[22] The second, entirely new offense, requires proof beyond a reasonable doubt of willful infringement by the reproduction, distribution, or transmission (including assisting others in reproduction or distribution) of one or more copies[23] of one or more copyrighted works having a total retail value of $5000 or more.

This new criminal offense is a misdemeanor if the retail value of the works infringed falls between $5000 and $10,000. If the value exceeds $10,000, the offense becomes a felony. Unlike existing law and unlike the modified "commercial purpose" offense, the "nonprofit" offense lacks a 180-day limit for aggregating the infringing activity. Infringing activity that is spread out over the five year period of the new statute of limitations (discussed below) could be aggregated to reach the $5000 threshold for a misdemeanor offense or the "more than $10,000" threshold for a felony offense.

The sponsors of S. 1122 made clear in their introduction of the bill that they see the "commercial purpose" element of the existing law as an "enormous loophole in criminal liability for willful infringers..."[24] The main thrust of the bill is to "close this loophole" and make possible the criminal prosecution of nonprofit infringers like M.I.T. student David LaMacchia.[25]

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[22]This "commercial purpose" offense is also modified by defining "financial gain" to include barter or exchange for value, including receipt of copyrighted works.

[23]A drafting adjustment should probably be made in proposed §506(a)(2) -- the nonprofit criminal offense. The bill refers only to infringement by one or more "copies." It should read "copies or phonorecords."

[24]141 CONG. REC. S11451, S11452 (daily ed. August 4, 1995) (Statement of Sen. Leahy).

[25]*United States v. LaMacchia*, 871 F. Sup. 535 (D. Mass. (1994) (wire fraud indictment dismissed; no criminal copyright liability for nonprofit infringer).

Undoubtedly, if the Congress decides that criminal copyright liability is necessary to deter willful nonprofit infringers (notwithstanding the historical arguments against criminal liability for these infringers), an amendment similar to S. 1122 will achieve that objective. It should be clear, however, from any review of the history of criminal copyright liability that the "commercial purpose" element of the offense has not previously been considered a "loophole." The "commercial purpose" element has been deliberately chosen by the Congress for nearly 100 years to insulate nonprofit infringers from the threat of criminal prosecution. Until now, the possibility of civil liability has been considered adequate and fair in response to the economic impact of nonprofit infringement.

In comparison with other forms of intellectual property, an argument can be made that exposure to criminal *copyright* liability is already strong. For example, there is no criminal liability for violation of the digital audio recording statutory license of 17 U.S.C., chapter 10; for infringement of the semiconductor chip/integrated circuit design rights of title 17 U.S.C., chapter 9; or for infringement of any patent rights in title 35 U.S.C.. Criminal liability for trademark infringement has existed only for 11 years, since enactment of the Trademark Counterfeiting Act of 1984, 18 U.S.C. §2320(a). Within the copyright law itself, there is no criminal liability for infringement of the software and record rental rights.
17 U.S.C. §109(b)(4).

In essence, Congress has proceeded cautiously in creating criminal liability for infringement of intellectual property. Some major intellectual property rights are enforced only through civil remedies. The criminal remedies for willful copyright infringement for profit have a longer history than criminal remedies for other violations of intellectual property rights, but Congress has always proceeded cautiously in the copyright field also.

Under S. 1122 large new classes of users of copyrighted works risk exposure to the threat of criminal prosecution, depending upon the enforcement policies of the Justice Department and local United States Attorneys. These nonprofit users include teachers, professors, students, librarians, researchers, scholars, Internet users, and members of the general public.

To the extent that "willful" is interpreted as requiring a specific intent to infringe the Copyright Act, the true exposure to criminal liability is significantly reduced. However, threats may be made by copyright proprietors against nonprofit groups. Also, the government in criminal prosecutions in the past has argued for the lesser "intent-to-copy" standard of willfulness,[26] which broadens the risk of criminal liability for ordinary citizens.

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[26]*See, United States v. Moran,* 757 F. Supp. 1046, 1048 (D. Neb. 1991) (Government's "intent-to-copy" standard rejected).

2) Definition of financial gain

In a change related to the extension of criminal liability to nonprofit infringers, S. 1122, while retaining a separate "commercial purpose" offense, would define "financial gain" to include receipt of anything of value. The purpose of this amendment is to equate barter or exchange with sale of copyrighted works as establishing a "commercial purpose." The existing Copyright Act does not define the phrase "for purposes of commercial advantage or private financial gain" or any of its constituent parts.

The modified "commercial purpose" offense applies to any such willful copyright infringement. As under current law, this offense would be a misdemeanor except where certain statutory thresholds are met. The "commercial purpose" offense is subject to felony charges for reproduction or distribution, including by transmission or assisting others, of 10 or more copies or phonorecords during any 180-day period of one or more copyrighted works having a total retail value of more than $5000. The retail value represents an increase from the "more than $2500" value of existing law.

The inclusion of barter or exchanges of value, including receipt of other copyrighted works, apparently represents a significant broadening of the "commercial purpose" offense compared to existing law. One can argue that the existing law could have been stretched to include the value of bartered works, to satisfy the "for profit" element, but criminal prosecutions have generally been confined to attempts to sell unauthorized copies or phonorecords.

3) Felony charges for transmissions

In a change that is almost as consequential as the extension of copyright liability to nonprofit infringers, S. 1122 for the first time makes possible felony prosecutions for unauthorized transmission of copyrighted works.

"Transmission" of a copyrighted work is not expressly designated as one of the exclusive rights of the copyright owner under existing law.[27] It is generally understood that "transmissions" are a subset of the public performance right under existing law. Satellite transmissions, cable transmissions, and presumably computer network transmissions are subject to the public performance right and the limitations on that right.

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[27]In its final report, the Working Group on Intellectual Property Rights of the National Information Infrastructure Task Force recommends amendment of the Copyright Act to grant an exclusive transmission right by redefining the distribution right of 17 U.S.C. 106(3) (Commerce Department, September 1995), page 213. (Hereafter, "NII Working Group Report").

If the transmission is private, there is no copyright liability -- civil or criminal. The same result follows if one of the exemptions from, or limitations on, the public performance right is applicable.[28]

If copyright liability arises under existing law for an unauthorized transmission, criminal liability is subject only to misdemeanor charges. This is because only infringements of the rights of reproduction or distribution are subject to felony charges under existing law. This difference in penalties has existed since felony charges first became possible for second offenses of record piracy in 1974.

S. 1122 equates "transmissions" with reproductions and distributions. A new offense of "assisting others" in the infringing reproduction or distribution of copyrighted works is also created by the bill.[29] The proposal concerning transmissions is consistent with the civil liability recommendations of the Report of the NII Working Group on Intellectual Property Rights.[30] One possible legislative choice would be to delay consideration of new felony liability for transmissions until the issue can be considered in the context of the proposal for broader civil liability.

4) Statute of limitations

The bill would increase from three to five years the statute of limitations on commencing criminal prosecution for copyright infringement.

Under existing law, the limitation on commencing civil or criminal infringement is essentially the same: three years after the cause of action arose (criminal action) or three years after the claim accrued (civil action).[31]

Lengthening the period for commencing a criminal action would make criminal prosecution easier. The government could take a longer time to

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[28]For example, the exemption of 17 U.S.C. §110(2) for performance of a nondramatic literary or musical in the course of instructional broadcasting; the exemption of §110(5) for public reception of radio and television signals on home-style receiving equipment absent a direct charge for the reception; the cable compulsory license of 17 U.S.C. §111(c)-(f); the satellite carrier compulsory license of 17 U.S.C. §119.

[29]The Copyright Act of 1909, effective until December 31, 1977, had included an offense of knowingly and willfully aiding or abetting in an infringement. This offense was eliminated by the Copyright Act of 1976.

[30]The Report of the Working Group also expressed general support for the amendments of the copyright law set forth in S. 1122, but did not specifically address the significance of creating a felony offense for transmission of works. NII Working Group Report at 229.

[31]17 U.S.C. §507.

investigate and prepare the case. The longer period, coupled with the absence of a 180-day limit for the nonprofit infringer's offense, would substantially increase the exposure of certain classes of citizens to criminal liability. The longer period could also be used to delay prosecution until the statutory threshold could be met for felony charges against nonprofit infringers.

5) Victim impact statements

For the first time, the bill proposes to add provisions relating to victim impact statements to the criminal copyright penalty provisions,[32] the criminal penalties for unauthorized fixations of live music,[33] and the criminal penalties for trafficking in counterfeit goods or services.[34]

With respect to each criminal offense, the producers and sellers of legitimate works/products, holders of the relevant intellectual property rights, and legal representatives of such producers, sellers, and rightsholders would have the right to present a victim impact statement during preparation of the presentence report pursuant to rule 32(c) of the Federal Rule of Criminal Procedure. The statement could identify the victim of the offense and describe the extent and scope of the injury and loss suffered by the victim, including the estimated economic impact of the offense.

The bill also directs the Sentencing Commission to ensure that the applicable guideline range for a defendant convicted of an intellectual property offense is sufficiently stringent to deter such a crime, and to reflect adequately the retail value and quantity of the legitimate items that are infringed.

ARGUMENTS FOR AND AGAINST INCREASED CRIMINAL COPYRIGHT LIABILITY

Supporting Arguments

The principal supporters of the legislation are copyright owners of computer software, databases, and other works likely to be distributed or transmitted through the Internet, other computer networks, and electronic bulletin boards. Copyright owners in general are likely to support the bill.

The sponsors of the bill see the "commercial purpose" element of the offense as an "enormous loophole in criminal liability for willful infringers who can use digital technology to make exact copies of copyrighted software and other

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[32] 18 U.S.C. §2319.

[33] 18 U.S.C. §2319A.

[34] 18 U.S.C. §2320.

digitally encoded works, and then use computer networks for quick, inexpensive and mass distribution of pirated, infringing works."[35]

The case of *United States v. LaMacchia,* 871 F. Supp. 535 (D. Mass. 1994) is cited as an example of the problem the bill addresses. It is alleged that LaMacchia's nonprofit, but infringing, activities "resulted in an estimated loss to the copyright holders of over one million dollars over a 6 week period."[36]

In the past, civil remedies for copyright violations were considered adequate to deter nonprofit infringers. It is argued that computer networks, like the Internet, now enable anyone to engage in mass distribution/transmission of digitized copyrighted works, sometimes at virtually no cost. The potential for mass infringement by, for example, intellectual property "vandals," it is argued, can be deterred only by criminal penalties. Civil remedies are inadequate because many nonprofit infringers, like the student LaMacchia, are "judgment-proof" -- they cannot pay large civil damages. It is too expensive to bring civil infringement suits merely to enjoin the infringer, if there is no realistic possibility of collecting a monetary judgment.

Supporters of the bill argue that the "monetary thresholds, combined with the scienter requirement, would insure that criminal charges would only apply to willful infringements, not merely casual or careless conduct, that result in a significant level of harm to the copyright holder's rights." [37]

Opposing Arguments

Opposition to S. 1122, or at least serious concern, has been expressed within the education community. It is likely that the concern will increase as more segments of the nonprofit communities become aware of the bill.

Opponents would argue that S. 1122 is not a bill that merely closes a "loophole" in the criminal law of copyright infringement. It proposes the most radical change in the *mens rea* standard since criminal copyright liability was created in 1897. The bill removes the one safeguard that the library and educational communities have had against possible threats of criminal liability.

Copyright owners, it is argued, do not need the luxury of criminal penalties against nonprofit users. Without a commercial purpose, virtually any infringing activity would have only a slight impact on the copyright holder's rights. If there is significant economic impact, the copyright owners should enforce their rights through civil remedies.

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[35]141 CONG. REC. S11451, S11452 (daily ed. August 4, 1995) (Statement of Sen. Leahy).

[36]*Ibid.*

[37]*Ibid.*

Opponents see S. 1122 as an overreaction to an isolated, exceptional action by a student computer "hacker." They argue there is no justification for exposing millions of ordinary citizens to criminal liability. The copyright law is a mystery to ordinary citizens. The intangible nature of the complex rights means that they can be "intentionally" infringed through mistakes or misunderstandings. If there is a mistaken but possibly "intentional" distribution through a computer network, criminal liability for nonprofit infringers could theoretically ensnare millions of ordinary citizens.

The standard of "willfulness" as interpreted by prosecutors is not an adequate safeguard against excessive criminal liability for nonprofit users.

Even if the courts uniformly interpret "willful" to require specific intent to infringe, a point not clearly settled, factual issues will arise as to whether or not the standard has been satisfied. Under S. 1122, it is argued, nonprofit users will face the risk of criminal prosecution, or threats of prosecution, in the form of intimidation tactics by rightsholders and perhaps government authorities.

The statutory thresholds of $5000 for misdemeanor offenses and $10,000 for felony offenses are no safeguards against overzealous invocation of criminal liability, opponents argue. In today's marketplace, these amounts are easily aggregated, especially since nonprofit infringers do not have the benefit of the 180-day time limitation that is granted to "for profit" infringers. Also, the lengthening of the statute of limitations period to five years substantially increases citizen exposure to criminal copyright liability.

Opponents of S. 1122 would also argue that imposition of felony liability for transmissions is at best premature and at worst unjustified. At a minimum, it is argued, felony liability for transmissions should be thoughtfully examined as part of the consideration of the recommendations of the Working Group on Intellectual Property Rights of the National Information Infrastructure Task Force.

CONCLUSIONS

Congress has until now concluded that nonprofit infringers are adequately deterred by civil remedies. S. 1122 would extend criminal liability to willful nonprofit infringers if the retail value of the works infringed is $5000 or more. The bill also makes infringement by transmission a felony offense for the first time.

Proponents of S. 1122 argue that criminal penalties are necessary in the digital world and cyberspace. They assert that the potential for mass copying/distribution/transmission of digitized works over the Internet, other computer networks, and electronic bulletin boards cannot be controlled merely with civil remedies. Unauthorized copying can, within a short time frame and at little cost to the infringer, cause millions of dollars of damages to

rightsholders. Proponents say criminal penalties are needed to highlight the seriousness of the violation, deter potential infringers, and provide remedies against those who are "judgment-proof."

Opposition to S. 1122, or at least serious concern, has been expressed within the education community. Copyright owners, it is argued, have strong civil remedies and do not need the luxury of criminal penalties against nonprofit users. Without a commercial purpose, virtually any infringing activity would have only a slight impact on the copyright. Where there is an economic impact, copyright owners should enforce their rights through civil remedies. Opponents see S. 1122 as an overreaction to an isolated, exceptional action by a college student. They are concerned that the bill exposes teachers, librarians, and other nonprofit users to the threat of criminal liability for the first time. They doubt that the statutory thresholds and standard of willfulness are sufficient safeguards against overzealous rightsholders and prosecutors.

Legislative options to address the concerns of the education community might include: an exemption for teachers and librarians; clarification of the willfulness standard to require a specific intent to infringe; substantial upward revision of the statutory thresholds for nonprofit infringers; or express exemption for persons acting on a belief that their activity is noninfringing.

Another alternative approach would be to consider the proposed changes in criminal liability in tandem with the legislative recommendations of the Working Group on Intellectual Property Rights, National Information Infrastructure Task Force.

As another alternative, Congress might consider amendment of the wire fraud statute rather than the copyright law. Under this approach, Congress could establish criminal liability under 18 U.S.C. §1343 for using wires, radio, television, satellites, or other transmission facilities with the intent to deceive or defraud someone with respect to an intellectual property interest.