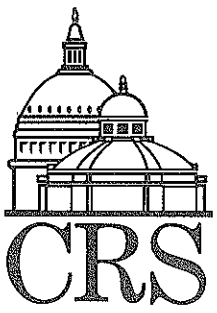
CRS Report for Congress

"Digital Era Copyright Enhancement Act": Analysis of H.R. 3048

May 18, 1998

Dorothy Schrader
Senior Specialist
American Law Division



Congressional Research Service • The Library of Congress



ABSTRACT

The "Digital Era Copyright enhancement Act" (H.R. 3048) would amend the Copyright Act to make changes in copyright law relating to use of copyrighted materials in electronic, digital environments such as the Internet. The bill would make changes in United States law to implement the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty. Other amendments cover fair use, library reproduction of copyrighted works, the first sale doctrine, distance learning, ephemeral recordings, operational copying by computers, and shrink-wrap licensing of computer software. This report analyzes H.R. 3048 and briefly compares its main provisions with the provisions of S. 2037, another WIPO treaties implementation bill, which passed the Senate in May 1998. This report will be updated when legislative events warrant it.

The Congressional Research Service works exclusively for the Congress, conducting research, analyzing legislation, and providing information at the request of committees, Members, and their staffs.

The Service makes such research available, without partisan bias, in many forms including studies, reports, compilations, digests, and background briefings. Upon request, CRS assists committees in analyzing legislative proposals and issues, and in assessing the possible effects of these proposals and their alternatives. The Service's senior specialists and subject analysts are also available for personal consultations in their respective fields of expertise.

"Digital Era Copyright Enhancement Act": Analysis of H.R. 3048

Summary

The Internet, other computer networks, and advances in digital technologies provide unparalleled opportunities for worldwide communications and economic growth. In order to reap the full potential of these new technologies, many difficult technical and legal policy issues must be confronted and resolved. One of these general policy issues concerns the scope of protection for copyrighted works and limitations on the rights of copyright owners against unauthorized copying in digital, electronic environments.

Bills were introduced in the 104th Congress (S. 1284 and H.R. 2441) to makes changes in the copyright law as it relates to use of copyrighted works on the Internet and in digital, electronic environments generally. Hearings were held on these issues, but the bills were not enacted.

In the 105th Congress, Internet copyright policy issues have arisen in the context of implementation of two new intellectual property law treaties — the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty. In forwarding the treaties to the Senate for its advice and consent, the Clinton Administration recommended a "minimalist" approach to the implementing legislation, which is reflected in S. 1121 and H.R. 2281 as originally introduced. Under that approach, the bills proposed legislation only concerning protection against circumvention of anti-copying technologies and against removal or alteration of copyright management information ("CMI") and a few technical amendments.

Subsequently, S. 1146 and H.R. 3048 were introduced as alternative WIPO treaties implementation bills. These bills proposed amendments relating to such Internet policy issues as fair use, library reproduction, ephemeral copying, distance learning, and operational copying by computers, in addition to the anti-circumvention and CMI provisions. S. 1146 and another separate bill, H.R. 3209, also addressed the issue of copyright liability of online service providers ("OSPs").

In the most recent developments, the House Judiciary Committee on April 1, 1998 reported a revised version of H.R. 2281, which essentially incorporates many provisions of H.R. 3209. The Senate Judiciary Committee on May 6, 1998 reported a new bill, S. 2037, which embodies the amendments made to H.R. 2281 and adds further amendments concerning circumvention of anti-copying technology, OSP liability, library reproduction of copyrighted works, and other matters. The Senate passed S. 2037 with a few technical amendments on May 14, 1998.

This report primarily analyzes the "Digital Era Copyright Enhancement Act" (H.R. 3048) and briefly reviews the developments relating to the alternative WIPO implementation bills (S. 2037 and H.R. 2281).

Contents

Background 1
Discussion of H.R. 3048 3
- Fair Use 4
- Library Uses 4
- First Sale Doctrine 4
- Distance Learning 4
- Ephemeral Recordings 4
- Operational Reproduction by Computers 5
- Preemption of "Shrink-Wrap"Licenses 5
- Circumvention of Technological Measures 6
- Copyright Management Information 7

"Digital Era Copyright Enhancement Act": Analysis of H.R. 3048

The "Digital Era Copyright Enhancement Act" (H.R. 3048), as described by its co-sponsors Mr. Boucher and Mr. Campbell, would amend the Copyright Act, title 17 of the U.S. Code, to "update and preserve balance in the Copyright Act for the 21st Century; to advance educational opportunities through distance learning; [and] to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty."[1]

H.R. 3048 contains proposed amendments to the Copyright Act relating to fair use, library reproduction, the first sale doctrine, distance learning, ephemeral recordings, operational copying by computers, and "shrink-wrap" licenses. A new chapter 12 would be added to title 17 U.S. Code enacting new legal protection against circumvention of anti-copying technologies and against fraudulent removal or alteration of copyright management information, to satisfy the obligations of two articles in each of the two new WIPO treaties.

Background

The Internet, other computer networks, and advances in digital technologies provide unparalleled opportunities for worldwide communications and economic growth, in the judgment of most experts. It is also generally agreed that, in order to tap this potential fully, many difficult technical and policy issues must be confronted and resolved. One of these policy issues concerns the scope of protection for copyrighted works against unauthorized copying or other unlawful use.

The general issues relating to Internet uses of copyrighted material are implicated both by national legislative proposals and by two new international treaties in the field of intellectual property.

At the national level, bills were introduced in the 104th Congress (S. 1284 and H.R. 2441) to make changes in the copyright law related to Internet uses of copyrighted works.[2] Hearings were held on the bills, and private sector groups held negotiating sessions under the auspices of the congressional oversight committees. No legislation was passed.

---

[1] Legislative purposes clause of the bill as introduced on November 13, 1997.

[2] The bills in the 104th Congress tracked the recommendations of a Working Group on Intellectual Property, which was part of the White House Information Infrastructure Task Force. The Report of the Working Group was published in September 1995. Department of Commerce, Intellectual Property and the National Information Infrastructure, Report of the Working Group on Intellectual Property Rights of the Information Infrastructure Task Force.

At the international level, two new intellectual property treaties were created by a diplomatic conference in Geneva, Switzerland, on December 20, 1996. The World Intellectual Property Organization ("WIPO") Copyright Treaty covers copyright protection for computer programs and databases (to the extent the latter are "intellectual" works), and clarifies or creates rights relating to use of copyrighted works over the Internet and in digital, electronic contexts.[3] The second treaty, the WIPO Performances and Phonograms Treaty, covers protection for performers and producers of sound recordings (called "phonograms" internationally),[4] and tracks many of the rights extended to copyright subject matter by the WIPO Copyright Treaty.

The WIPO treaties have been sent to the Senate for its advice and consent, and the President has recommended implementing legislation that adopts a "minimalist" approach to treaty implementation. S. 1121 and H.R. 2281, as originally introduced in the First Session of the 105th Congress, embodied the Administration's proposals for WIPO treaties implementation.

The original Administration bills were premised on the assumption that existing United States law is largely consistent with the obligations of the treaties. Consequently, S. 1121 and H.R. 2281 as introduced proposed amendment of U.S. copyright law concerning only two new substantive issues, as well as certain technical amendments. The Copyright Act would have been amended to provide new legal protection i) against circumvention of anti-copying technologies, and ii) against performance of certain acts relating to fraudulent removal or alteration of copyright management information ("CMI").

The only other amendments originally proposed by S. 1121 and H.R. 2281 are technical in nature and relate primarily to consequential adjustments to those definitions and sections of the Copyright Act that affect treaty relationships and the eligibility of foreign authors to claim U.S. copyright.

Subsequent to the introduction of the Administration's implementation bills, two other WIPO implementation bills were introduced. S. 1146 and H.R. 3048 contain many common provisions, but they are not companion bills.[5] They differ

---

[3] *For an analysis of this Treaty, see, D. Schrader, World Intellectual Property Organization Copyright Treaty: An Overview*, CRS Report No. 97-444A.

[4] For an analysis of this treaty, *see* D. Schrader, *World Intellectual Property Organization Performances and Phonograms Treaty: An Overview*, CRS Report No. 97-523 A.

[5] H.R. 3048 and S. 1146 contain the same proposals relating to fair use, library reproduction, distance learning, ephemeral recordings, operational reproduction by computers, and protection against removal or alteration of CMI. The provisions of these bills on protection against circumvention of anti-copying technologies are also virtually identical, except that the definition of "effective technological measure" differs slightly. H.R. 3048 contains amendments relating to the first sale doctrine and "shrink-wrap" licenses not found in S. 1146. H.R. 3048 does not contain any provisions on online service provider liability whereas Title I of S. 1146 addresses this issue. Finally, H.R. 3209 deals only with the online service provider liability issue. A revised version of H.R. 3209 was added to H.R. 2281 at a House

(continued...)

from the original Administration bills substantially, both with respect to the issues addressed and in the legislative solutions for the common issues covered by all four bills. Unlike the original Administration bills (S. 1121 and H.R. 2281), S. 1146 and H.R. 3048 propose amendments of the Copyright Act concerning many of the Internet or National Information Infrastructure ("NII") copyright issues such as fair use, library reproduction, ephemeral copying, distance learning, and operational copying by computers. A separate bill, H.R. 3209, addresses only the online service provider copyright liability issue.

In the most recent developments, the House Judiciary Committee, on April 1, 1998, approved H.R. 2281 as amended,[6] and the Senate Judiciary Committee, on May 6, 1998, approved a new bill, S. 2037, which is the successor to S. 1121.[7] The Senate passed S. 2037, with a few essentially technical amendments, on May 14, 1998, by a vote of 99-0.

On March 31, 1998, representatives of copyright owners and online service providers had reached an agreement concerning the issue of OSP copyright liability. Based on this agreement, the House Judiciary Committee essentially combined H.R. 2281 with a revised version of H.R. 3209 and reported the bill as H.R. 2281. As revised, H.R. 2281 only partly reflects the private sector agreement on OSP liability. Additional elements of the agreement will reportedly be added to H.R. 2281 by means of a House Floor amendment.[8] At the same mark-up session, the House Judiciary Committee rejected a series of amendments to H.R. 2281 along the lines of the proposals in H.R. 3048.

The new Senate bill, S. 2037, contains the amendments made to H.R. 2281 plus the full private sector agreement on OSP copyright liability and other amendments addressing additional copyright policy issues, including changes in the circumvention of anti-copying measures provisions, new provisions on library reproduction of copyrighted works, new provisions on ephemeral recordings, and other matters.

Discussion of H.R. 3048

The Digital Era Copyright Enhancement Act, H.R. 3048, proposes several amendments to the Copyright Act that would update the limitations on the rights of copyright owners in the context of digital, electronic uses of copyrighted works. The bill would make other changes in United States law to implement the obligations the United States would assume if this country ratifies the WIPO Copyright and Performances-Phonograms Treaties.

---

[5](...continued)
Judiciary Committee mark-up on April 1, 1998.

[6] The written report of the Committee on the Judiciary to accompany H.R. 2281 has not been filed by May 18, 1998, the date of this CRS Report.

[7] S. REP. NO. 105-190, 105th Cong., 2d Sess. (Filed May 11, 1998).

[8] "Industry Groups Reach Accord on Online Copyright Liability Legislation," 55 BNA Patent, Trademark & Copyright Jour. 557-558 (April 9, 1998).

Fair Use. The bill would amend section 107 of the Copyright Act, title 17 U.S. Code, to specify that "fair use" applies to digital as well as analog transmissions. The courts would be instructed not to give independent weight to the means of performing, displaying, or distributing a work, when evaluating the fair use statutory criteria.

Library Uses. The existing library exemption of 17 U.S.C.§108 would be expanded under H.R. 3048 by permitting library reproduction of three copies or phonorecords (rather than the one copy of existing law); by deleting the references of existing law to reproduction only in "facsimile form;" and by adding, as a new justification for library reproduction, the factor that the work is stored in an obsolete format.[9]

First Sale Doctrine. H.R. 3048 would amend section 109 of the Copyright Act (which contains limitations on the public distribution right of copyright owners known as the "first sale doctrine"). The owner of a copy of a phonorecord in a digital format would be given an exemption to perform, display, or distribute the work by a transmission to a single recipient, if that person erases or destroys his or her copy or phonorecord at substantially the same time. To the extent necessary for such performance, display, or distribution, reproduction of the work would also be exempt.[10]

Distance Learning. The existing instructional broadcasting exemption of 17 U.S.C.§110(2) would be expanded by H.R. 3048 to exempt "distance learning" — that is, performances, displays, or distributions of works by analog or digital transmission to remote sites for reception of systematic instructional material by students officially enrolled in the course and by government employees as part of their official duties, would be exempt from copyright liability.[11]

Ephemeral Recordings. Section 112(b) of the Copyright Act, which now deals with performances and displays by means of "ephemeral" (i.e., temporary) recordings of works by nonprofit organizations and governmental bodies, would be expanded by H.R. 3048 to cover distribution of a work (in addition to public performance and display).[12]

---

[9] Similar library reproduction amendments are included in S. 2037 as passed by the Senate, except that S. 2037 adds the condition that copies or phonorecords reproduced in digital formats can be used only on the premises of the library in lawful possession of a copy and S. 2037 defines when a format is obsolete.

[10] S. 2037 does not contain any amendments concerning the first sale doctrine.

[11] S. 2037 would defer any specific amendments of the Copyright Act concerning distance learning pending submission of a report by the Register of Copyrights. The bill mandates a report by the Register within six months of enactment.

[12] S. 2037 contains a different amendment concerning ephemeral recordings than the proposal in H.R. 3048. An amendment of 17 U.S.C. §112 would extend the existing ephemeral recording exemption to nonsubscription broadcasts of sound recordings in digital formats. Another amendment (which relates to the anti-circumvention provisions of the bill) requires

(continued...)

Operational Reproduction by Computers. The existing limitations of 17 U.S.C.§117 apply to the rights of a copyright owner of a computer program. H.R. 3048 would create new limitations in an amended section 117 on the rights of any copyright owner, in the case of automatic, operational copying by computers. Under this amendment, it would not be an infringement to make a copy of any work in a digital format if the copying: i) is incidental to the operation of a device in the course of a lawful use of the work, and ii) does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[13]

This exemption for copying that is "incidental" to operation of a device is intended to exempt the automatic reproduction of works which occurs when messages or communications are transmitted via a computer network. The condition that the copying must not "conflict with the normal exploitation" etc. tracks exactly the general limitation permitted by Article 10 of the WIPO Copyright Treaty and Article 16(2) of the WIPO Performances and Phonograms Treaty.

Preemption of "Shrink-Wrap"Licenses. H.R. 3048 would amend section 301 of the Copyright Act to preempt state common or statutory laws to the extent they would otherwise allow enforcement of certain non-negotiable licenses (so-called "shrink-wrap" licenses).

The term "shrink-wrap" license refers to the fact that unilateral licensing terms are commonly expressed on the outside wrapping of a computer software package, which is removed in order to use the software. The license provides that by removing the wrapping from the package, the purchaser of the software becomes bound by the licensing agreement. The enforceability of such licenses is not settled, but they are commonly employed by the software industry.

Under H.R. 3048, federal copyright law would preempt state laws in the case of licenses covering uncopyrightable material, or licenses which abrogate or restrict the Copyright Act's limitations on rights of copyright owners, as found in sections 107-114, 117, or 118 of the Act.[14]

Circumvention of Technological Measures. Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty

---

[12](...continued)
copyright owners to make available to broadcasters the necessary means to make ephemeral recordings, if the copyright owner's anti-copying measures would otherwise prevent the making of the recording.

[13] Although S. 2037 does not contain a broad exemption for operational reproduction by computers, it contains several provisions that create narrower exemptions for "automatic copying" of works in connection with computer uses. S. 2037 exempts computer repair or maintenance companies for the automatic reproduction of a computer program that occurs when the computer is activated. The OSP liability provisions of S. 2037 generally eliminate any monetary liability for the copying by an OSPthat occurs when the OSP acts as a mere conduit in a transmission, copies material as part of system caching, or stores material at the direction of a system user.

[14] S. 2037 contains no provision dealing with shrink-wrap licensing.

establish a new kind of legal protection for copyright owners, performers, and producers of phonograms. Treaty adherents shall provide adequate and effective legal protection and effective legal remedies against the circumvention of effective technological measures (that is, protection against infringing conduct in the nature of acts that defeat anti-copying technologies).

Each of the pending implementation bills addresses this obligation, but H.R. 3048 and S. 1146 differ fundamentally from the approach of the Administration bills, S. 1121 and H.R. 2281, as originally introduced. In general, the electronics industry favored the approach of H.R. 3048 (and S. 1146) and opposed the Administration's original bills. Rightsholders generally have favored the Administration's original bills.

The electronics industry contended that the original Administration bills exceeded the minimum Treaty obligations concerning protection for technological measures whereas H.R. 3048 does not. H.R. 3048 creates remedies against acts of circumvention for infringing purposes; specifically provides that this "conduct" does not include the manufacture, importation, or distribution of a device or computer programs; and establishes only civil remedies.[15]

Rightsholders, on the other hand, generally supported the original Administration bills. They argued that criminal penalties are necessary to enforce rights against circumvention of anti-copying technologies; that a meaningful law must protect against devices whose primary effect is to defeat anti-copying technologies; and that components parts must be specifically covered to guard against evasion of the law.

H.R. 2281, as reported by the House Judiciary Committee, adds a knowledge requirement to the anti-circumvention provisions in order to establish liability against someone who only markets the technology defeating device; exempts nonprofit libraries, archives, and educational institutions from liability under the anti-circumvention provisions if they obtain access to the copyrighted work solely to make a good faith determination about purchasing the work; allows a court to reduce or remit civil damages when the violator did not know and had no reason to believe that his or her activities constituted violations of the anti-circumvention provisions; requires a court to remit civil damages against a nonprofit library, archives, or educational institution if the nonprofit entity was not aware and had no reason to believe that its acts constituted a violation; and exempts the same nonprofit entities from any criminal liability for violation of the anti-circumvention provisions. Also, the bill exempts lawfully authorized investigative, protective, or intelligence activity of federal and state law enforcement or intelligence entities.

---

[15] By contrast, the Administration's bills as introduced arguably prohibited sale of a device or component part thereof that is marketed or primarily used to circumvent anti-copying technologies; applied to manufacturers, importers, and distributors of such devices; and created criminal as well as civil remedies. H.R. 2281 as reported by the House Judiciary Committee and S. 2037 as passed by the Senate contain changes in the anti-circumvention provisions.

S. 2037, which replaced the Administration's bill (S. 1121) in the Senate, passed the Senate on May 14, 1998. This bill includes the changes adopted by the House Judiciary Committee in H.R. 2281 to the circumvention of anti-copying technology provisions, and makes additional changes which, in their totality, apparently satisfy the concerns of the electronics-computer manufacturing industries on this issue.[16] S.2037 allows circumventions for purposes of interoperability of computers; expressly declares that nothing in the anti-circumvention provisions enlarges or diminishes the doctrines of vicarious and contributory infringement; declares that electronics-computer manufacturers have no obligation to design consumer electronics, telecommunications, or computing products to achieve protection against circumvention; provides that with respect to a component of a product, the court may consider the necessity of the component's incorporation in the product for the sole purpose of preventing access by minors to certain Internet material (if the component does not itself violate the anti-circumvention right); but essentially requires that rightsholders must cooperate with broadcasters and other transmitters to provide broadcasters/transmitters with the means to make ephemeral recordings.

Copyright Management Information. Under Article 12 of the WIPO Copyright Treaty and Article 19 of the WIPO Performances and Phonograms Treaty, member countries must provide "adequate and effective legal remedies against any person knowingly performing" prohibited acts relating to the removal or alteration of **electronic** rights management information. The remedies could be civil or criminal or both.

H.R. 3048 would implement this treaty obligation by creating civil remedies against knowing and intentional acts to mislead or induce infringement by removal or alteration of copyright management information ("CMI"). The civil remedies also apply against public distribution or importation of copies or phonorecords containing altered CMI or from which CMI has been removed.

CMI is defined to include the following information in electronic or digital form: the title, author, and copyright owner of the work; the copyright notice; terms and conditions for uses of the work; identifying numbers or symbols; and any other identifying information required by Copyright Office regulations.

The remedies of H.R. 3048 do not apply, however, to mere manufacture, importation, or distribution of a device. Finally, protection apples only to CMI information in electronic or digital form.[17]

---

[16] The Home Recording Rights Coalition ("HRRC") (which is a trade association representing manufacturers, distributors, and retailers of electronics products and some consumers) issued a press release, on May 1, 1998, praising the changes in S. 2037. The press release states that the amendment to the anti-circumvention provisions "significantly clarifies that this legislation would not chill the design of new generations of recordings and computer products." HRRC Press Release of May 1, 1998 ,entitled "HRRC Praises Senators Hatch, Leahy and Ashcroft for Clarification of WIPO Bill." (www.hrrc.org/).

[17] By contrast, the Administration's bills create criminal as well as civil remedies and extend protection to CMI in analog as well as electronic form.

H.R. 2281, as reported by the House Judiciary Committee, and S. 2037 as passed by the Senate contain several amendments to the copyright management information provisions. CMI is defined to include information about performers, writers, and directors of audiovisual works, except in the case of radio and television performances, in addition to information about authors. There are several changes in the liability provisions. In the case of innocent violations, where the court finds that the violator was not aware and had no reason to believe that his or her acts were a violation of the CMI provisions, the court may reduce or remit civil damages. Where the violator is a nonprofit library, archives, or educational institution who was not aware and had no reason to believe its acts were a violation, the court shall remit any civil damages. The same nonprofit entities are exempt from criminal penalties. The lawfully authorized activities of federal and state law enforcement and intelligence entities are exempt from any liability for violations of the CMI provisions.

In addition to the above changes, S. 2037 also places limits on the liability of transmitting organizations such as broadcast and cable and their program suppliers for CMI violations. With respect to analog transmissions, there is no CMI violation if compliance is not technically feasible or would create an undue financial hardship and if there is no intention to induce, enable, facilitate or conceal an infringement. With respect to digital transmissions, liability depends upon the setting of a digital transmission standard by consensus of representatives of transmitting organizations and copyright owners. Until the standard is established, the transmitting organization is generally not liable for CMI violations if the entity has no intention to induce, enable, facilitate or conceal an infringement and if transmission of the CMI would result in signal degradation or conflict with government regulations or an industry-wide standard adopted before enactment.