GAO Congressional Record, 102nd Congress, Senate

1. Bill	2. Date	3. Pages
S.893	October 8, 1992	S17958-959

4. Action:

Violation of Software Copyright: Senate concurred in the amendments of the House to S. 893, to amend title 18, United States Code, to impose criminal sanctions for violation of software copyright, clearing the measure for the President.

Pages S17958-59

PENALTIES FOR VIOLATIONS OF SOFTWARE COPYRIGHT

Mr. FORD. Mr. President, I ask that the Chair lay before the Senate a message from the House of Representatives on S. 893.

The PRESIDING OFFICER laid before the Senate the following message from the House of Representatives:

Resolved, That the bill from the Senate (S. 893) entitled "An Act to amend title 18, United States Code, to impose criminal sanctions for violation of software copyright," do pass with the following amendments:

Strike out all after the enacting clause and insert:

SECTION 1. CRIMINAL PENALTIES FOR COPYRIGHT INFRINGEMENT.

Section 2319(b) of title 18, United States Code, is amended to read as follows:

"(b) Any person who commits an offense under subsection (a) of this section—

"(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, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, with a retail value of more than $2,500;

"(2) shall be imprisoned not more than 10 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and

"(3) shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, in any other case.".

SEC. 2. CONFORMING AMENDMENTS.

Section 2319(c) of title 18, United States Code, is amended—

(1) in paragraph (1) by striking 'sound recording', 'motion picture', 'audiovisual work', "'phonorecord'", and inserting "'phonorecord'"; and

(2) in paragraph (2) by striking "118" and inserting "120".

Amend the title so as to read: "An Act to amend title 18, United States Code, with respect to the criminal penalties for copyright infringement.".

Mr. HATCH. Mr. President, I was pleased last summer when the Senate unanimously passed S. 893, as originally proposed. I introduced S. 893 earlier this year, with my good friend from Arizona, Senator DECONCINI as an original cosponsor. The bill was designed to help the computer software industry combat the growing problem of large-scale commercial piracy of its products, by making such conduct a felony under Federal law punishable by fine and imprisonment. In so doing, S. 893 simply treated software piracy in the same manner that Congress had earlier decided to treat motion picture and sound recording piracy.

For several years, Federal law has provided strong criminal penalties for persons involved in the unauthorized production or distribution of multiple copies of phono records, sound recordings, and motion pictures. In a similar manner, this legislation was intended to provide the same enhanced criminal sanctions for the violation of copyright in computer programs. S. 893 as passed by the Senate on June 4 protected only computer software. We chose this approach because computer software differs in many ways, such as design, use, and distribution methods, from those forms of intellectual property presently afforded protection in the criminal law.

The amended version of S. 893 that has now come back to us from the House contains all of the teeth of our computer software bill but it has altered and refined the way in which the criminal code addresses the entire question of criminal penalties for large-scale copyright infringement. Instead of the previous scheme of separate statutes setting different penalties for piracy of different types of copyrighted material, the new House-passed law sets a uniform standard of liability for piracy of copyrighted works, whether they be motion pictures, records, books, or computer software. This is a welcome and logical development in clarifying the point at which the copyright law intersects with the criminal code, and I would like to sincerely compliment Representative BILL HUGHES, the author of this amendment, for his foresight in seeing how my bill could be improved without losing any of its substance.

The House approach to the problem of criminal copyright infringement necessitated several amendments to current law. Because the amended bill predicates liability on the proof that the copied material exceeds a certain "retail value," questions will no doubt arise as to what constitutes "retail value." I note with approval the extended discussion of this issue in the House report, particularly the view that in the amended bill the term "retail value" means the suggested retail price of the legitimate copyrighted work at the initial time of its release, and not the market price of the pirate copy. In the case of a copyrighted work that is not sold at retail, the "retail value" for the purpose of the statute should reflect the harm to the copyright holder and not the infringer's profits; for example the unauthorized release of videocassettes or

audiocassettes embodying as yet unreleased material will necessarily harm copyright owners, distributors and retailers far in excess of the retail value of the infringing material. For example, a film print or audio studio master which is not to be sold on the open market obviously has substantial asset value.

The important point to keep in mind, is that retail value should be determined by looking to the value of the copyrighted works in the legitimate retail market, not the thieves' criminal market. For the purpose of the criminal law, we should determine the harm from the point of view of the copyright holder, not by the value of the gain to the criminal. So I agree that the term "retail value" should generally mean the suggested retail price of the legitimate copyrighted work at the initial time of release and not the value of the pirate copies. In the event the copyrighted work is not sold in the form copied or distributed, the term "retail value" should mean the greater of the replacement cost or the true cost of production of the copyrighted work, including, but not limited to, the purchase cost of the components of the copyrighted work, design costs, and labor and overhead expenses required to create and manufacture the work.

Another potential question relating to the new standard of criminal liability for copyright infringement is an issue that arose during House consideration of this legislation. 17 U.S.C. 506(a) currently prohibits any person from infringing a copyright "willfully and for purposes of commercial advantage or private financial gain." The term "willfully," although used in copyright statutes since 1897 for criminal violations, has never been defined. Instead, copyright owners and prosecutors have relied on standards developed by the courts. It is my view that it is proper for the courts to continue to develop this concept in appropriate cases, and that the version of S. 893 we adopt today by specifically failing to define further the concept of "willful" conduct acknowledges that fact.

I note that the House considered defining the term "willfully" in this legislation. In fact, the House Judiciary Committee's Intellectual Property Subcommittee included a definition of "willfully" in the version of the bill it referred to the full committee, but the full committee-approved bill did not contain that language. The version of S. 893 that has passed the House and is before us now does not define "willfully." Therefore, S. 893 does not directly or by implication signal any disapproval with the manner in which the courts have previously interpreted this element of the offense.

At no point during our proceedings in the Senate Judiciary Committee or in the Subcommittee on Patents, Copyrights and Trademarks did we consider the question of defining by statute the term "willfully", but I am certain that we would be willing to do so in the future if presented with reasons to do so. It is my opinion that at this point the courts do seem to be interpreting the term "willfully" in a workable manner, that the existing statute is meeting the objectives that Congress set out when the law was enacted, and that the text of S. 893 is sufficient as adopted. As the House report indicates, and as I would like to emphatically state, this criminal statute is not designed to reach instances of permissible, private home copying, nor does it represent any infringement on traditional concepts permitting the fair use of copyrighted materials for purposes of research, criticism, scholarship, parody, and other long-recongized uses. Similarly, this bill is not designed to interfere with evolving notions of fair use, as that concept is applied with respect to new communications networks and computer technologies. Once again, I would point out that the mens rea requirement is strict with respect to this crime: unless done for the express purposes of obtaining commercial advantage or private financial gain, copying of copyrighted material is not a crime under S. 893. Simply put, the copying must be undertaken to make money, and even incidental financial benefits that might accrue as a result of the copying should not contravene the law where the achievement of those benefits were not the motivation behind the copying.

Mr. President, the willful infringement of copyright in computer software programs is a widespread practice that is threatening the United States software industry. The easy accessibility of computer programs distributed in magnetic media format, together with the distribution of popular applications programs, has led to persistent large-scale copying of these programs. Studies indicate that for every authorized copy of software programs in circulation, there is an illegal copy also in circulation. Losses to the personal computer software industry from all illegal copying were estimated to be $1.6 billion in 1989. If we do not address the piracy of these programs, we may soon see a decline in this vibrant and important sector of our economy.

Not only is the software industry seriously damaged, but the public is also victimized by these acts of piracy. The purchaser of pirated often pays full price for a product which he or she believes is legitimate. However, not only may there be imperfections in the actual reproduction, but the quality of the product is also often lower as a result of cheap duplication equipment. Furthermore, the consumer of pirated works is ineligible for the important support and backup services typically offered by the software publisher.

As was noted during the hearings on increasing the penalties for illegal copying of records, sound recordings, and motion pictures, stiffer penalties toward piracy do act as a deterrent to these types of crimes. Enhanced penalties for large-scale violation of software copyright is more in line with the seriousness of the crime.

I believe that the version of S. 893 that we consider today will provide a strong tool for prosecutors and others who are interested in deterring the growing problem of computer software piracy. As I have mentioned, it maintains as well the strict protections that the motion picture and sound recording industries have enjoyed for nearly a decade, and it nips in the bud the potential for large-scale book piracy that might otherwise be exploited through emerging technologies.

Under the language of S. 893, a person involved in software piracy—or for that matter any crime copyright infringement—would be subject to a fine and imprisonment of up to 10 years if the offense is a second or subsequent act of reproducing or distributing at least 10 copies of the copyrighted work. For a first offense, the penalty cannot exceed a term of 5 years imprisonment and/or the fine prescribed by title 18, for first offenses. In addition, the criminal liability attaches if fewer than 10 works are copied if the retail value of the copied works exceeds $2,500. In this instance, the prescribed imprisonment cannot exceed 1 year.

Mr. President, I am very pleased that both Houses of Congress have reached an agreement on this important issue. It is my belief that enactment of S. 893 will end the unacceptable current situation where this significant area of criminal activity is insufficiently proscribed and ineffectively punished.

Before concluding, I would be remiss if I did not note again the significant help we have received in drafting this legislation from Representative BILL HUGHES, the chairman of the House Subcommittee on Intellectual Property and the Administration of Justice, as well as the customary strong support we are used to receiving from Representative CARLOS MOORHEAD, the ranking Republican on that subcommittee. Nor could this successful conclusion have been achieved without the excellent staff work of Bill Patry, Hayden Gregory, Joe Wolfe, and Tom Mooney from the House Subcommittee on Intellectual Property; Karen Robb, chief counsel of the Senate Subcommittee on Patents, Copyrights, and Trademarks; and Darrell Panethiere of my Judiciary Committee staff. To all of them, I express my gratitude.

Mr. FORD. Mr. President, I move the Senate concur in the amendments of the House.

The PRESIDING OFFICER. The question is on agreeing to the motion.

The motion was agreed to.

Mr. FORD. Mr. President, I move to reconsider the vote.

Mr. SIMPSON. I move to lay that motion on the table.

The motion to lay on the table was agreed to.