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Copyright Law: Digital Rights Management Legislation

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Summary

Digital Rights Management (DRM) refers to the technology that copyright owners use to protect digital media. This report surveys several of the DRM bills that were introduced in the 107th Congress and those that are pending in the 108th Congress. Generally, the bills are directed at two separate goals. One goal is to increase access to digitally-protected media for lawful purposes. The other attempts to thwart digital piracy and would do so by enhancing civil and criminal sanctions for digital copyright infringement and educating the public about the rights of copyright holders.

Although no bills were enacted during the 107th Congress, two of the bills focusing on access have been reintroduced in the 108th Congress. Representatives Boucher and Lofgren reintroduced their bills from the 107th Congress. They are H.R. 107, the "Digital Media Consumers' Rights Act of 2003" and H.R. 1066, respectively. H.R. 1066 is renamed the "Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003." And Senator Wyden introduced S. 692, a labeling disclosure bill entitled the "Digital Consumers Right to Know Act."

Bills addressing piracy include H.R. 2517, the "Piracy Deterrence and Education Act of 2003"; H.R. 2752, the "Author, Consumer, and Computer Owner Protection and Security Act of 2003"; H.R. 3632, the "Anti-counterfeiting Amendments of 2003"; and, S. 1932, the "Artists Rights and Theft Prevention Act of 2003."

S. 1621, the "Consumers, Schools, and Libraries Digital Management Awareness Act of 2003," introduced by Senator Brownback, addresses several DRM issues. It would prohibit the Federal Communication Commission from establishing mandatory technology standards and require disclosure requirements for access controlled digital media and consumer electronics. It also addresses the subpoena process by which copyright owners acquire personal information about suspected infringers.

Contents

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Background. Digital technology has radically altered the landscape of copyright law. The potential for unauthorized but near perfect replication of digital media poses new challenges to copyright owners. Copyright law gives a copyright holder the exclusive right to reproduce, adapt, distribute, perform publicly and display protected material for a limited term.[1] Historically, technology (or lack thereof) presented an obstacle to wide-spread piracy. For example, repeated copying of analog video or audio tapes could result in a degradation of the quality of the reproduction; packaging and transportation for distribution could be cumbersome. There are no comparable impediments to copying and distributing media in a digital format.

The legal basis for protecting copyright has traditionally been through the initiation of a civil proceeding by the copyright holder against the infringer for injunctive relief and/or money damages, although there are criminal sanctions for willful infringement as well.[2] The efficacy of this remedy is diminished in a digital environment where distribution may be decentralized, instantaneous, and global. Unauthorized peer-to-peer (P2P) file sharing of music illustrates this problem. Instituting a civil suit against thousands of individuals for *each* unauthorized download has traditionally been presumed to be infeasible. Recently, however, the Recording Industry Association of American (RIAA) has embarked on an aggressive litigation enforcement effort against college students and others who upload or download copyrighted sound recordings on P2P file-sharing sites.[3] The efficacy of this effort remains to be seen. Nevertheless, copyright owners believe that *prevention* of piracy is preferable. The technology-based approaches and mechanisms that copyright owners utilize to protect digital media are referred to as digital rights management (DRM).

Congress has enacted two laws to date which facilitate DRM to enhance copyright protection. The Audio Home Recording Act (AHRA) of 1992 effects a technology-based regulatory program for consumer goods designed to copy analog

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[1] 17 U.S.C. § 106.

[2] *Id.* at §§ 501- 505.

[3] See, Frank Ahrens, *4 Students Sued Over Music Sites; Industry Group Targets File Sharing at Colleges,* THE WASHINGTON POST, April 4, 2003 at E1; Ted Bridis, *RIAA's Subpoena Onslaught Aimed at Illegal File Sharing,* THE WASHINGTON POST, July 19, 2003 at E1.

and digital musical recordings.[4] It requires manufacturers and distributors of audio recording devices to employ copy control technology. However, a "digital musical recording" is defined as a "material object" that does *not* include "one or more computer programs."[5] Hence, the AHRA does not cover songs fixed on computer hard drives and extends only to recordings from the material objects in which songs are otherwise normally fixed, such as recorded compact discs (CDs), digital audio tapes, audio cassettes, long-playing albums, digital compact cassettes, and mini-discs.[6]

The Act requires consumer goods manufacturers to incorporate the Serial Copyright Management System (SCMS) into digital audio recording devices. SCMS is technology that sends, receives, and acts upon information about the generation and copyright status of the files that it plays. It allows copies to be made from an authorized recording, but prevents the SCMS-equipped machine from making copies of copies. The AHRA prohibits circumvention of the SCMS system as well. In consideration for permission to facilitate consumer copying of music recordings, manufacturers are required to pay music royalties based on sales of the devices. And, as a consequence of and in consideration for the technology-limited copying and royalty payments program, manufacturers, importers, and distributors of audio recording devices, and consumers who use them for noncommercial use, are protected from suit for copyright infringement.

A more recent – and more controversial – DRM law is the Digital Millennium Copyright Act (DMCA) of 1998. This law added a new chapter 12 to the Copyright Act entitled "Copyright Protection and Management Systems."[7] Subject to relatively narrow exceptions, this law makes it illegal to circumvent a technological copyright-control measure. This includes activity to descramble a scrambled work, to decrypt an encrypted work, or to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.[8] In contrast to copyright infringement, which prohibits unauthorized or unexcused *use* of copyrighted material, the anti-circumvention provisions of the DMCA prohibit the design, manufacture, import, offer to the public, or trafficking in technology produced to circumvent copyright encryption programs, regardless of the actual existence or absence of copyright infringement. Even though the anticircumvention provisions of the DMCA have, to date, been upheld by the courts, critics argue that they have a chilling effect on rights of free speech and that their implementation will thwart the public's ability to access copyrighted works, which is ultimately necessary in order to exercise "fair use."[9]

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[4] 17 U.S.C. §§ 1001 - 1010.

[5] 17 U.S.C. § 1001(5).

[6] See, Recording Industry Ass'n of America v. Diamond Multimedia Sys., Inc., 180 F.3d 1073 (9th Cir. 1999).

[7] 17 U.S.C. § 1201 *et seq.*

[8] *Id.* at § 1201(a)(3)(A).

[9] For more detail, see CRS Report RL31827, *"Digital Rights" and Fair Use in Copyright*
(continued...)

Fair Use. The doctrine of "fair use" is a limitation upon a copyright holder's exclusive rights. It permits the public to use a copyrighted work for limited purposes, such as criticism, comment, news reporting, teaching, scholarship or research.[10] And, although the concept of "personal use," *i.e.*, copying lawfully acquired copyrighted materials for one's personal use, is not expressly protected by statute, it is widely-accepted and judicially sanctioned.[11] Fair use protects the public interest in a free exchange of ideas and discourse.

The ever-changing state of technology and DRM laws raise many issues, several of which paradoxically confound one another. To the extent that copyrighted digital material is not encrypted, it may be subject to piracy on a massive scale. But, as digital material is increasingly encrypted to protect against piracy, the public is in jeopardy of restricted access, which may impede the exercise of fair use. And, some observers assert that protection controls give copyright holders more exclusive control over their creations than the copyright law intends.[12] Content owners, however, argue that allowing *limited* circumvention only to facilitate fair use, including personal use, is impracticable; once the circumvention technology becomes publicly available, its protective value is compromised.

Members of 107th Congress responded by introducing bills which address two sides of the issue – piracy prevention and fair use access. Legislative proposals would have mandated government-sponsored encryption technology and enhanced content owners' abilities to fight P2P piracy over the Internet. Other bills were intended to clarify and expand content users' fair use, including personal use, access to digital media. While none of these bills were enacted during the 107th Congress, the underlying policy issues have not been resolved, and the matter continues to be the subject of interest in the 108th Congress. This report surveys several of the DRM bills introduced in the 107th and 108th Congresses.

Bills Promoting Enhanced DRM Anti-piracy Protection in the 107th Congress. *S. 2395 107th Cong., 2d Sess. (2002), the "Anticounterfeiting Amendments of 2002".* This bill was introduced by Senator Biden on April 30, 2002. It was reported out of the Senate Judiciary Committee with an amendment in the nature of a substitute on July 18, 2002. Among its findings, the bill notes that the American intellectual property (IP) sector has invested millions of dollars to develop sophisticated authentication features, but counterfeiters nonetheless traffic in and tamper with them. This bill's approach was to amend federal law to provide greater civil and criminal penalties to combat tampering activities that facilitate counterfeiting.

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[9] (...continued)
Law by Robin Jeweler (March 24, 2003).

[10] 17 U.S.C. § 107.

[11] See Sony Corp. v. Universal Studios, Inc., 464 U.S. 417 (1984)(authorizing consumer use of home videocassette recorders to "time-shift" television broadcasts) .

[12] See, e.g., Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813 (2001).

The bill would have amended 18 U.S.C. § 2318 to broaden criminal sanctions for trafficking in counterfeit "authentication features," which would include holograms, watermarks, symbols, code, and number and letter sequences which are used by a copyright owner to verify copyright legitimacy. The statute currently covers counterfeit labeling, packaging, and documentation. It would have added a new subparagraph 2318(f) which created civil remedies for counterfeiting violations enforceable by copyright owners. Remedies would have included impoundment, actual damages, or statutory damages.

S. 2048, 107th Cong., 2d Sess. (2002), the "Consumer Broadband and Digital Television Promotion Act". This bill, introduced on March 21, 2002 by Senator Hollings, would have directed digital media device manufacturers, consumer groups, and copyright owners to attempt to reach an agreement on security system standards for use in digital media devices and encoding rules within a year after enactment. If parties were unable to agree on acceptable standards, the Federal Communications Commission (FCC), in consultation with the Copyright Office, would do so. With respect to prospective encoding rules, the bill stipulated that the rules "shall take into account the limitations on the exclusive rights of copyright owners, including the fair use doctrine." It further provided that "[n]o person may apply a security measure that uses a standard security technology to prevent a lawful recipient from making a personal copy for lawful use... ."[13]

The bill would have implemented the standards by requiring interactive computer services to incorporate security measures associated with standard security technologies and by requiring manufacturers, importers and sellers of digital media devices to include the security technologies. It would have prohibited removal or alteration of the technology from the devices. How fair use access and the security technology would interface was not expressly addressed.

H.R. 5211, 107th Cong., 2d Sess. (2002), a bill "to limit the liability of copyright owners for protecting their works on peer-to-peer networks". Sponsored by Representative Berman, this bill was designed to create "a safe harbor from liability so that copyright owners could use technological means to prevent the unauthorized distribution of that owner's copyrighted works via a P2P network."[14] It would have added a new section to the Copyright Act, 17 U.S.C. § 514, which would exempt copyright owners from liability under state and federal law for

> disabling, interfering with, blocking, diverting, or otherwise impairing the unauthorized distribution, display, performance, or reproduction of his or her copyrighted work on a publicly accessible peer-to-peer file trading network, if such impairment does not, without authorization, alter, delete, or otherwise impair the integrity of any computer file or data residing on the computer of a file trader.[15]

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[13] S. 2048, § 3(e).

[14] Introductory statement of Rep. Berman, 148 CONG. REC. E1395 (daily ed. July 25, 2002).

[15] H.R. 5211 at § 514(a).

The bill included exceptions to the safe harbor for copyright owners, and required them to notify the Department of Justice before employing specific blocking technologies. It created a new cause of action, in addition to existing ones, for file traders to deter harassment or abuse of P2P networks by copyright owners.

Because the bill aimed to allow the prevention of unauthorized file trading over decentralized P2P networks, its sponsors suggested that it would not adversely impact consumers' fair use of digital media.[16]

Bills Addressing Digital Access. In addition to the bills noted below, Senator Wyden and Representative Cox introduced, respectively, Senate and House joint resolutions entitled the "Consumer Technology Bill of Rights."[17] They were reportedly based upon a proposal of the same name by the advocacy group, DigitalConsumer.org.[18] Their premise was that copyright law should not curtail consumers' fair use rights with respect to digital and electronic entertainment media. The resolutions' enumeration of consumer rights included the right to use technology for

- "time-shifting," *i.e.*, recording legally acquired audio or video for later listening or viewing;
- "space-shifting," *i.e.*, using legally acquired content in different places;
- making backup or archival copies;
- using legally acquired content on the electronic platform or device of choice; and,
- translating legally acquired content into comparable formats.

Discussed below are two bills addressing digital fair use which were introduced in the latter part of the 107th Congress.

H.R. 5522, 107th Cong.,2d Sess. (2002), the "Digital Choice and Freedom Act". On Oct. 2, 2002, Representative Zoe Lofgren introduced this bill. Among its findings is the observation that "[D]igital technology threatens the rights of copyright holders. Perfect digital copies of songs and movies can be publicly transmitted without authorization to thousands of people at little or no cost. On the other hand, technological control measures give copyright holders the capacity to

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[16] Note 14, *supra.* ("Because its scope is limited to unauthorized distribution, display, performance or reproduction of copyrighted works on publicly accessible P2P systems, the legislation only authorizes self-help measures taken to deal with clear copyright infringements. Thus, the legislation does not authorize any interdiction actions to stop fair or authorized uses of copyrighted works ... or any interdiction of public domain works.")

[17] S.J.Res. 51, 107th Cong., 2d Sess. (2002) and H.J.Res. 116, 107th Cong. 2d Sess. (2002).

[18] *Wyden Offers Digital Fair Use Resolution*, 64 BNA Patent, Trademark & Copyright J. 585 (Oct. 25, 2002).

limit non-public performances and threaten society's interest in the free flow of ideas, information and commerce."[19]

In order to recalibrate the balance between the copyright interests of authors and society, H.R. 5522 would have amended the Copyright Act to effect three goals:

- To expressly provide that it is not a copyright infringement for a person who lawfully possesses or receives a transmission of a digital work to reproduce, store, adapt or access it for archival purposes or to transfer it to a preferred digital media device in order to effect a non-public performance or display;
- To amend 17 U.S.C. § 109,[20] to allow one who lawfully possesses a digital work to sell or otherwise dispose of it by means of a transmission to a single recipient, provided that the owner does not retain his or her copy; and
- To amend the DMCA, 17 U.S.C. § 1201, to permit circumvention of copyright encryption technology, including the manufacture and import of, and trafficking in technology, if it is necessary to enable a non-infringing use and the copyright owner fails to make available the necessary means for circumvention.

H.R. 5544, 107th Cong., 2d Sess. (2002), the "Digital Media Consumers' Rights Act of 2002". Introduced on Oct. 4, 2002 by Representatives Boucher and Doolittle, the Digital Media Consumers' Rights Act addresses copy-protected (*i.e*, non-standard) audio CDs through consumer disclosure via labeling requirements. Specifically, the bill would have amended the Federal Trade Commission Act by adding a new section entitled "Inadequately Labeled Copy-Protected Compact Discs." The new labeling requirements were intended to notify consumers when a non-standard CD has copy-protection measures which could preclude playing on and/or copying to a computer hard drive or other consumer electronic devices. The Federal Trade Commission would be empowered to engage in rulemaking regarding audio CD labeling to prevent consumer confusion about playability and recordability.

The bill, in a vein similar to H.R. 5522, would have amended the DMCA to broaden the exemption for scientific research from the anti-circumvention rule; to permit circumvention for non-infringing uses; and, to permit the manufacture and sale of circumvention software capable of a significant non-infringing use.

Bills introduced in the 108th Congress.

Bills Addressing Digital Access and Disclosure. Representatives Boucher and Lofgren have reintroduced their bills from the 107th Congress. In the 108th Congress, they are H.R. 107 and H.R. 1066, respectively. H.R. 1066 is

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[19] H.R. 5522 at § 2(5).

[20] 17 U.S.C. § 109. This provision, known as the "first sale" doctrine, permits the owner of a copyrighted book or record to sell or otherwise dispose of it without violating copyright holder's right to control distribution.

renamed the "Benefit Authors without Limiting Advancement or Net Consumer Expectations (BALANCE) Act of 2003."

S. 692, 108th Cong., 1st Sess. (2003), the "Digital Consumer Right to Know Act." Introduced by Sen. Wyden, this bill emphasizes and would require disclosure of DRM anti-piracy protections that would restrict consumers' use of digital content. Specifically, the Federal Trade Commission (FTC) is directed to issue rules governing disclosures of technological features that limit the practical ability of a purchaser "to play, copy, transmit, or transfer such content on, to, or between devices or classes of devices that consumers commonly use ... prior to sale."[21] Examples of limitations subject to the disclosure requirement include:

- limitations on "time shifting" (recording for later viewing or listening) of free over-the-air and certain subscription packaged audio or video programming;
- limitations on reasonable and noncommercial use of legally acquired video or audio programing to facilitate "space shifting" (recording for use in different physical locations), including the transfer of the content to different electronic platforms or devices;
- limitations on making backup copies of legally acquired content;
- limitations on using limited excerpts of legally acquired content for criticism, comment, news reporting, teaching, scholarship, or research; and
- limitations on engaging in the transfer or sale of legally acquired content.

The goal of the legislation is to address legitimate consumer expectations regarding how they may use and manipulate content in concert with developing technology, and to promote development of an acceptable balance between protecting against piracy and preserving utility and flexibility for consumers.[22]

S. 1621, 108th Cong., 1st Sess. (2003), the "Consumers, Schools, and Libraries Digital Rights Management Awareness Act of 2003". Introduced by Senator Brownback on Sept. 16, 2003, the DRM Awareness Act addresses several issues, including mandatory technology standards, disclosure requirements for access controlled digital media and consumer electronics, the subpoena process by which copyright owners acquire personal information about suspected infringers, and the secondary market for digital consumer goods. Among the bill's findings are:

- it is not in public interest for the federal government to mandate the inclusion of access or redistribution control technologies used with digital media into consumer electronics;
- access controlled compact discs have created confusion and inconvenience for consumers, educational institutions, and libraries;

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[21] S. 6692, § 3(b).

[22] 149 CONG. REC. S4327 (daily ed. March 24, 2003)(Statement of Sen. Wyden).

- it is not in the public interest for Internet service providers to disclose personal information about subscribers for whom they transport electronic communications; and
- it is not in the public interest to allow access or redistribution control technologies to limit the secondary market for digital media products.

To this end, S. 1621 would *prohibit* the Federal Communications Commission from establishing mandatory access control technology (including redistribution control technology) standards for consumer digital media machines and devices. The FCC could not require manufacturers and importers of digital media devices to incorporate access or redistribution control technology. It would, however, grandfather in two pending FCC rulemaking proceedings, namely, "cable plug and play" and digital broadcast copy protection, subject to the requirement that objective standards, not specific technologies, be adopted.

In addition, the bill would:

- direct the Federal Trade Commission to establish an advisory committee to study and report on the ways in which access and redistribution control technology affect consumers, educational institutions, and libraries and how to better inform them of the impact of such technologies;
- direct the FTC to establish labeling requirements to inform consumers of the existence of access or redistribution control technology-protected digital products;
- address litigation over the DMCA's requirement that Internet service providers (ISPs) respond to subpoenas obtained by copyright holders who suspect copyright infringement. The bill provides that ISPs *not* make information about its subscribers available unless a subpoena is issued pursuant to state law or the Federal Rules of Civil Procedure, or unless the information requested relates to allegedly infringing digital products residing on the system or network of the ISP;
- create a consumer "first sale" doctrine for digital media by providing that an owner may transmit a digital product to a single recipient as long as the transmission technology contemporaneously deletes the transmitter's copy; and
- prohibit manufacturers and vendors of digital media from imposing any access or redistribution control technology that prevents a consumer from donating the item to an educational institution or library, or that limits consumer resale or donations to specific venues or distribution channels.

Bills Addressing Copyright Piracy.

H.R. 2517, 108th Cong., 1st Sess. (2003), the "Piracy Deterrence and Education Act of 2003". Introduced on June 19, 2003 by Representative Lamar Smith, this bill takes a two-pronged approach to copyright piracy. It would enhance criminal copyright infringement enforcement and public education about use of

copyrighted material. Section 1 of the bill sets forth a lengthy recitation of congressional findings of problems that warrant corrective legislation.[23] Among the findings are:

- IP theft through electronic means causes great economic damage;
- Many computer users do not know that copyright laws apply to the Internet or believe that they will not be caught or prosecuted for their conduct;
- Use of P2P systems may pose serious security and privacy threats to computer users;
- It is important that federal law enforcement agencies prosecute theft of copyright and that the public be educated about the security and privacy risks associated with being connected to unauthorized P2P networks; and
- Formal copyright registration requirements unnecessarily burden criminal and civil litigation efforts to enforce the laws protecting copyright.

The bill directs the Federal Bureau of Investigations (FBI) to develop programs to deter copyright infringement over the Internet, including the issuance of appropriate warnings and facilitating information sharing about infringing activities among law enforcement agencies, ISPs and copyright owners. The Attorney General is directed to designate at least one agent to investigate IP theft in any unit of the Department of Justice (DOJ) responsible for investigating computer hacking and IP crimes.

The DOJ is directed to establish an "Internet Use Education Program" to educate the general public about the damage resulting from IP theft; the privacy and security risks of P2P file-sharing to obtain unauthorized copies of copyrighted work; and, to coordinate and consult with the Departments of Education and Commerce regarding copyright law and Internet use. The Attorney General will also establish criteria for use by specified copyright owners of the seal of the FBI for deterrent purposes in connection with digital works of authorship.

The bill also waives certain copyright registration requirements, considered to be formalities, which hinder or delay enforcement actions by the government, including actions to prevent importation of infringing materials by the Bureau of Customs and Border Protection of the Dept. of Homeland Security.

H.R. 2752, 108th Cong., 1st Sess. (2003), the "Author, Consumer, and Computer Owner Protection and Security Act (ACCOPS) Act of 2003." Introduced by Rep. Conyers as a companion bill to H.R. 2517, ACCOPS would increase international and domestic anti-piracy IP law enforcement efforts. In addition to increasing appropriations for criminal law enforcement and procedures directing U.S. cooperation with foreign authorities in international investigations, the

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[23] See also, *The Piracy Deterrence and Education Act of 2003: Hearing on H.R. 2517 before the House Subcomm. on Courts, the Internet, and Intellectual Property*, 108th Congress, 1st Sess. (2003).

bill increases criminal sanctions for domestic copyright infringement. Title III of the bill would, among other things:

- amend 17 U.S.C. § 506 to provide that willful, unauthorized uploading of a single copyrighted work on the Internet satisfies the standards for a felony as opposed to a misdemeanor offense.
- require P2P file-swapping software distributors to give notice of potential security risks posed by the software and to receive consent from the downloader of such software;
- make it a federal crime to surreptitiously record a movie being performed in a movie theater; and
- direct the courts to consider that providing misleading or false contact information to a domain registry by a domain name registrant is evidence of "willfulness" with respect to any copyright infringement committed through the use of the domain name.

H.R. 3632, 108th Cong., 1st Sess. (2003), the "Anti-counterfeiting Amendments of 2003." Introduced on November 21, 2003 by Rep. Lamar Smith, this bill is similar to S. 2395 introduced by Sen. Biden in the 107th Congress. The bill would amend a criminal law statute, 18 U.S.C. § 2318, which deals with trafficking in counterfeit labels, documentation and/or packaging for phonorecords, computer programs, motion pictures, and audio visual works.

As the law presently stands, § 2318 makes distinctions between counterfeit labels and counterfeit documentation or packaging based on the media affected. It is illegal to traffic in counterfeit labels for phonorecords, motion pictures, other audio visual works, and computer programs. But the prohibition against counterfeit documentation or packaging refers only to computer programs.

The bill would broaden the scope of § 2318 by applying the prohibition against trafficking in counterfeit labels *and/or* documentation *and/or* packaging for all the named forms of copyrighted media in addition to computer programs, that is, sound recordings on phonorecords, motion pictures, other audio visual works, and copyrighted documentation or packaging itself.

Upon conviction, under current law, the court may order the forfeiture and destruction of the counterfeit labels and items to which they are affixed. The bill permits the court to include equipment used to manufacture the counterfeit labels among that which may be forfeited and destroyed. It adds a new subsection 2318(f) which creates a civil cause of action for copyright owners injured by trafficking in the counterfeit material.

S. 1932, 108th Cong., 1st Sess. (2003), the "Artists Rights and Theft Prevention Act of 2003." Introduced on November 22, 2003 by Sen. Cornyn, this bill, if enacted, would add new criminal penalties for unauthorized recording or filming of motion pictures in a theater. It is intended to stem bootlegging and unauthorized distribution of "*prerelease* commercial works."

Movie studios have complained that all too frequently an unauthorized version of a film is available online even before it is commercially released. Problems have

been attributed to piracy by people in the film industry who have access to prerelease commercial works.[24] Specifically, S. 1932 would add a new law, 18 U.S.C. § 2319B, expressly prohibiting unauthorized recording of motion pictures in a motion picture exhibition facility.

The provision is conceptually related to current 18 U.S.C. § 2319A which establishes criminal sanctions for unauthorized filming or recording of live musical concerts.[25] S. 1932 would subject offenders to imprisonment for 3 to 6 years and forfeiture or destruction of the bootlegged copies. It would permit a victim of the crime to submit a victim impact statement to a probation officer.

Currently, 18 U.S.C. § 2319 sets forth conditions and penalties for criminal copyright infringement.[26] A person who infringes by transmitting something electronically for commercial gain and who posts 10 or more copies of a copyrighted work having a retail value of more than $2500 is subject to 5 to 10 years imprisonment and fines.[27] Anyone who, irrespective of motive for commercial gain, posts one or more copies having a retail value of more than $1000 is guilty of a misdemeanor and subject to one year imprisonment[28]; if the offense consists of uploading 10 or more copies having a value of $2500 or more, the crime is a felony and a term of imprisonment may be between 3 and 6 years.[29]

S. 1932 would establish another category of criminal infringement: unauthorized distribution of a prerelease commercial copyrighted work. It would amend § 2319 by adding a new subsection (e) mandating that anyone who uploads to the Internet a prerelease version of a non-dramatic musical work, a motion picture, or a sound recording shall be conclusively presumed to have met the higher felony standard (10 copies having a value of $2500), subjecting the offender to longer prison terms. In civil actions for prerelease infringement, damages shall be conclusively presumed to be no less than $2500 per infringement.

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[24] See, e.g., Bernard Weinraub, *Advance Film Copies Halted for Oscar Voters*, N.Y. TIMES, Oct. 1, 2003 at [http://www.nytimes.com/2003/10/01/movies/01OSCA.html...].

[25] See United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999), *cert. den.* 529 U.S. 1036 (2000) upholding 18 U.S.C. § 2319A under congressional authority to legislate pursuant to the Commerce Clause.

[26] This statute was amended in 1997 by P.L. 105-147, the No Electronic Theft Act. Prior to these amendments, the law basically defined criminal copyright infringement as willful infringement for commercial advantage or private gain. The amendments responded to situations where copyrighted material was posted on the Internet causing commercial harm by someone who did *not* do so for commercial gain. The Act added a new category to the definition of "willful" infringement, *i.e.*, electronic posting of copyrighted material – regardless of a desire for commercial gain – based on the number of copies and a specified commercial value.

[27] § 2319(b)(1) & (2).

[28] § 2319(c)(3).

[29] § 2319(c)(1) & (2).