

Congress Considers Legislation To Govern Copyright On The Internet

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Should a business be liable when an employee, acting outside of the scope of his or her job, sends infringing material in e-mail using the business's computer system? Under what terms should an Internet access provider be responsible for policing the tens of thousands of web pages on its system for infringing material? Does your company infringe a copyright when an employee browsing the Web hits an infringing site and copies are made in your server or on the employee's hard drive? Representatives of copyright owners say the threat of copyright liability in these and similar cases is essential to encourage cooperation from computer network operators. The operators of computer networks, both public and private, argue that such liability is unfair, and that the infringing user should be responsible.

Should devices (and parts of devices) that aid in circumventing copy prevention technology be outlawed, or just the act of circumvention? The copyright industries say yes, it is the only way to ensure that protected material stays protected. The consumer electronics industry, universities and libraries say no, a law directed at devices will interfere with consumer fair use rights and will make courts the arbiter of machine design, down to the component level.

Should intentional copyright infringement be a crime if it is not undertaken for commercial gain? The copyright industries say yes, it is the only way to ensure that malicious infringement on the Internet is punished. Others question whether a broad expansion of criminal liability is warranted.

These are just a few of the issues confronting Congress this year and next as they consider important bills that will affect copyright in the online environment. Four bills have been introduced. The House Intellectual Property Subcommittee held hearings on all of these subjects in September. The Senate Judiciary Committee also held a hearing on service provider liability.

Network Operator Liability.

A coalition of online service providers, Internet access providers, educational institutions and corporations that operate their own networks is seeking clarification of the law of copyright liability arising out of the acts of network users. The coalition's concerns are based on the strict liability nature of copyright law and the breadth of certain judicial decisions regarding doctrines of vicarious and contributory liability. Specifically,

they are concerned that the automatic operations of their networks at the behest of users could lead to liability in circumstances where they lack knowledge of infringement or the practical ability to control the infringement.

Representatives of the content community argue that no change to existing law is needed and that the threat of liability is essential to ensure that network operators do not turn a blind eye to user infringements. They are opposed to legislation on the issue.

Senator John Ashcroft (Mo.) and Congressmen Howard Coble (N.C.) and Henry Hyde (Ill.) have introduced different bills (S. 1146 and H.R. 2180, respectively) that would provide protection for network operators under certain circumstances.

Treaty Implementing Legislation.

In December, 1996, the World Intellectual Property Organization adopted two treaties in part designed to strengthen international copyright protection in the digital environment. While very few changes in U.S. law are needed to comply with the treaties, the treaties do require the U.S. to prohibit the "circumvention" of copy prevention technologies.

The Administration is advocating a bill (H.R. 2281) that broadly protects any technology that prevents copyright infringement. The bill proscribes the descrambling of scrambled or encrypted works and the manufacture, importation or distribution of devices "primarily designed" or "marketed" for the purpose of circumvention. The content community has hailed the treaties as critically important and supports the Administration's bill. However, universities and libraries are concerned that the broad prohibition against circumvention will eliminate or greatly weaken rights of "fair use" that have long been a key part of the copyright balance. Consumer electronics manufacturers fear that the broadly drafted legislation will outlaw legitimate recording devices and other equipment.

The liability and treaty issues have been linked politically. Legislation on either is unlikely to move without resolution of both issues. However, there is likely to be plenty of behind the scenes activity in the coming months.

Expansion of Criminal Liability.

In the wake of the LaMacchia case, in which an allegedly malicious Internet infringer of computer software escaped criminal liability because he did not benefit commercially, Congress is considering a broad expansion of criminal liability for willful copyright infringement. A proposed bill (S. 1044) would make any willful reproduction or distribution (including by electronic means) criminal, if it involves ten or more copies worth more than \$5,000. Interestingly, the language "including by electronic means" appears to imply that electronic transmission is "distribution," a point Congress refused to enact directly last year. The further criminalization of intentional copyright infringement could significantly raise the stakes of copyright litigation in the future.

Cyberlaw Postings will continue to follow these bills throughout this Congress.