

S. 4108

To modernize and enhance intellectual property laws, and for other purposes

IN THE SENATE OF THE UNITED STATES

APRIL 1, 2008

M_____ introduced the following bill, which was read twice and referred to the Committee on the Judiciary

A BILL

To modernize and enhance intellectual property laws, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1.—SHORT TITLE; TABLE OF CONTENTS

(a) SHORT TITLE.—This Act may be cited as the "Assuring Protections and Remedies for Intellectual Property Laws Act of 2008."

(b) TABLE OF CONTENTS.—The table of contents is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Findings.

TITLE I—DEPARTMENT OF INTELLECTUAL PROPERTY SECURITY

- Sec. 101. Establishment.
- Sec. 102. Secretary of IP Security; functions.
- Sec. 103. International jurisdiction.
- Sec. 104. Coordination of CHIPS and DIPS.

TITLE II—ENHANCING AND HARMONIZING INTELLECTUAL PROPERTY RIGHTS

- Sec. 201. Attempted infringement.

Sec. 202. Rights in sporting events.
Sec. 203. Serial Copy Management System.
Sec. 204. Term extension.
Sec. 205. Secondary liability.
Sec. 206. Tertiary liability.
Sec. 207. Modernizing fair use.
Sec. 208. Moral rights.
Sec. 209. Scope of copyright.

TITLE III—ENHANCEMENTS TO INTELLECTUAL PROPERTY ENFORCEMENT

Sec. 301. Forfeiture in criminal copyright infringement.
Sec. 302. Forfeiture in unauthorized recording of motion pictures.
Sec. 303. Forfeiture, destruction, and restitution.
Sec. 304. Interception of wire, oral, or electronic communications.
Sec. 305. Increased statutory damages.
Sec. 306. Computation of statutory damages in copyright cases.
Sec. 307. Self-help for rightsholders.
Sec. 308. Limitations on liability relating to material online.
Sec. 309. Limitations on civil actions for issuers of notices.
Sec. 310. Modernizing definition of piracy.

TITLE IV—ADDITIONAL TECHNOLOGICAL PROTECTION MEASURES

Sec. 401. Adoption of security system standards and encoding rules.
Sec. 402. Prohibition on shipment on interstate commerce of nonconforming digital media devices/
Sec. 403. Prohibition on removal or alteration of security technology; violation of encoding rules; deletion for security integrity.
Sec. 404.
Sec. 405. Damages

TITLE V—COPYRIGHT IN GOVERNMENT WORKS

Sec. 501. Copyright in government works.

SEC. 2.—FINDINGS

The Congress finds as follows:

- (a) that intellectual property is a significant contributor to the economy, stability, and mental well-being of the United States;
- (b) that the contributions to the economy made by intellectual property are significant, consisting of 80% of gross domestic product;
- (c) that the collection of taxes from the production and consumption of intellectual property therefore support the Nation in its provision of services such as law enforcement, national security, health, education, the general welfare, life, liberty, happiness and the pursuit thereof, real property, apple pie, national infrastructure, and national cyberinfrastructure;

- (d) that the protection of intellectual property is of the utmost importance in preserving these freedoms and benefits;
- (e) that substantial investments made in the interests of intellectual property on occasion do not realize returns for their investors;
- (f) that the theft of intellectual property has caused irreparable harm to the economy;
- (g) that the kidnapping of intellectual property has caused irreparable harm to industries intent on addressing market inefficiencies;
- (h) that the digitization of works irreparably harms their value;
- (i) that online technology increases the difficulty of investigating infringement;
- (j) that limitations and exceptions too often provide a safe haven for pirates;
- (k) that designated terms for copyright require continual extension and renewal.

TITLE I.—DEPARTMENT OF INTELLECTUAL PROPERTY SECURITY

SEC. 101.—ESTABLISHMENT

(a) There is established a Department of Intellectual Property Security, as an executive department of the United States within the meaning of title 5 (in this title referred to as "DIPS").

(b) Mission

(1) In general

The primary mission of DIPS is to—

- (A) Prevent the infringement of intellectual property rights in the United States and overseas;
- (B) Ensure the continued strengthening and expansion of intellectual property rights
- (C) Protect the investments made in creative works, the infrastructure supporting the creation and distribution of those works, the snack foods consumed by those enjoying those works, and other areas substantially connected with intellectual property
- (D) Prosecute and punish infringers of intellectual property, foreign and domestic, ensuring uniform, harmonized enforcement

SEC. 102.—SECRETARY OF IP SECURITY; FUNCTIONS

(a) Secretary

(1) In general

There is a Secretary of Intellectual Property Security, appointed by the President, by and with the advice and consent of the Senate.

(2) Head of Department

The Secretary is the head of DIPS and shall have direction, authority, and control over it.

(3) Functions vested in Secretary

All functions of all officers, employees, and organizational units of the Department are vested in the Secretary.

(b) Functions

The Secretary shall have the authority--

(1) to prosecute all criminal violations of federal and state intellectual property laws;

(2) to file civil suit on behalf of the United States in the stead of any copyright owner, identifiable or not, to enforce that owner's intellectual property rights;

(3) to initiate legal actions against infringements of property, provided some exercise of intellect contributed to the value of the property;

(4) to investigate all actual, alleged, potential, and attempted infringements of intellectual property;

(5) notwithstanding any provisions of federal, state, or international law, to obtain evidence of infringements of intellectual property by the use of enhanced interrogation techniques;

(6) to delegate to specific holders of intellectual property rights the authorities, duties and privileges of DIPS.

[PK: Paragraph 6 may present administrative law issues, as well as problems with the incentives of rightsholders to exercise their powers judiciously.]

SEC. 103.—INTERNATIONAL JURISDICTION

DIPS shall have the authority to render unto the authority of any other federal or foreign agency alleged infringers for the purposes of detention and interrogation.

SEC. 104.—COORDINATION OF CHIPS AND DIPS

The Computer Hacking and Intellectual Property Program established within the Department of Justice shall be transferred to and immersed within DIPS.

[PK: CHIP unites are currently within the Department of Justice. They were created in 2001 as an expansion of then-named Computer and Telecommunication Coordinator Program. CHIP units are, according to the DOJ, "specifically charged with building relationships in-district with the FBI, other agencies, and the local high tech community."]

TITLE II.—IMPROVING AND HARMONIZING INTELLECTUAL PROPERTY RIGHTS

SEC. 201.—ATTEMPTED INFRINGEMENT

Section 506(a) of title 17, United States Code, is amended—

- (1) by redesignating paragraph (3) as paragraph (4); and
- (2) by inserting after paragraph (2) the following:
 - “(3) ATTEMPT AND CONSPIRACY.—
 - “(A) ATTEMPT.—Any person who attempts to commit an offense under paragraph (1) shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt.
 - “(B) CONSPIRACY.—If two or more persons conspire to commit an offense under paragraph (1) and one or more of such persons do any act to effectuate the object of the conspiracy, each shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the conspiracy.”.

[Section 506 currently defines criminal copyright infringement. This provision creates two new crimes—attempted copyright infringement and conspiracy to commit copyright infringement.]

SEC. 202.—RIGHTS IN SPORTING EVENTS

Chapter 1 of title 17, United States Code, is amended by inserting after section 106A the following:

“§ 106B: Rights of athletic event organizers

(a) In addition to any and all rights granted in Section 106, the organizer of a sporting event has the exclusive right to do and to authorize any of the following:

- (1) to describe the sporting event, or its results, or related statistics;
- (2) to create an account of the sporting event, results, or related statistics;
- (3) to use pictures of the sporting event; or
- (4) to recreate the sporting event, including, but not limited to, the use of live actors, animals, abstract representations, digital creations, or video game based simulation.

Comment [sls1]: Not a joke: This language is taken verbatim from HR 3155 introduced by Reps. Chabot—The IP Enhanced Criminal Enforcement Act of 2007, and attempted infringement has also been proposed by the DOJ in their recommendations to Congress over the past few sessions.

Comment [sls2]: This may seem farfetched, but if you look at the copyright warnings distributed by the sporting leagues, this seems to be what they think the law is. Also, the idea / expression dichotomy didn't stop sports leagues from suing services that reported scores or fantasy sports leagues.

“(b) Scope and Exercise of Rights – Only the organizer of the sporting event has the rights conferred by subsection (a) in that sporting event. The rights conferred in subsection (a) do not extend to the participants in the sporting event. There may not be more than one organizer of a sporting event.

“(c) Exceptions – There are no exceptions.

“(d) Duration of Rights – The rights conferred in subsection (a) shall conditionally expire once there is no interest in the sporting event. This conditional expiration is revoked at a time where any person, or other legal entity, expresses an interest in the sporting event.

“(e) Transfer and Waiver – The rights conferred in subsection (a) may be transferred with the express permission of the rights holder. This transfer may only occur once per owner, and must be exclusive and complete. The rights conferred in subsection (a) may not be waived by the rights holder.

“(f) Enforcement – Enforcement of the rights conferred in subsection (a) is mandatory. If a rights holder fails to enforce the rights conferred in subsection (a), the Copyright Office is ordered to fine the rights holder no less than \$50,000 per failure. A court shall order damages of no less than \$10,000 per infringement.

“(g) Amendment to Section 101: The following shall be inserted into Section 101 preceding the “State” definition:

“(h) Definition—for the purposes of this section,

- (1) a “sporting event” is any event where a person, either alone or in a group, or an animal, either alone or in a group, or any combination thereof, engages in an activity that produces sweat, requires a ball, requires a stick of any kind, requires a net of any kind, or involves matching uniforms;
- (2) an audiovisual work shall be a “sporting event.”

[PK: This section nominally creates a new set of rights for sporting events, which are not in and of themselves currently covered by copyright—although fixations of their events are. This section drastically increases the control an owner has over how recordings of such an event can be used.

The section also appears to grant rights over accounts of the sporting events in question, extending to a user's relating of the scores and results of a game. This should run into problems with the idea/expression dichotomy, but see section 209 of the bill.

Note especially the definitions section—strangely, all audiovisual works are also included in the definition of "sporting events," so relating the plot of a movie could presumably be prohibited by the copyright owner, or the "organizer" of the movie. How this would be practically implemented is uncertain.]

SEC. 203.—SERIAL COPY MANAGEMENT SYSTEM

(a) Section 1008 of title 17, United States Code is repealed.

(b) Section 1002(d)(2) of title 17, United States Code is amended

(1) by striking "Encoding of copyright status not required" and inserting "Encoding of copyright status required"; and

(2) by striking "Nothing in this chapter requires" and inserting "This chapter requires"

Comment [sls3]: SCMS is real and it's required on all digital audio recording devices (hardware), but not on the media. The major thing keeping DARDs from becoming completely crippled is Section 1002(d)(2).

[PK: SCMS is a copy protection mechanism currently required on all digital audio recording devices by the Audio Home Recording Act of 1992. (note that most mp3 players aren't considered DARDs, but anything from a digital tape player to a minidisc player to an Inno to a digital memo recorder could count).

Currently, no manufacturer or distributor of a digital audio recording device can be sued for infringement based on home use of the devices. Subsection (a) repeals this, allowing manufacturers to be sued for consumers' use.

In the current codification of the AHRA, even though SCMS is required to be put on all players, there's no requirement that anyone has to put an audio flag on the content. Subsection (b) specifically requires that, in direct opposition to the original intent of the AHRA.]

SEC 204.—TERM EXTENSION

(a) Sections 303 and 304 of title 17, United States Code are repealed.

(b) Section 302 of title 17, United States Code, is amended to read as follows:

“§ 302. Duration of Copyright.

“(a) Copyrights shall remain in force so long the extant duration of the copyright remains a finite number, minus one day.

“(b) This section shall apply retroactively to all works which may be subject to copyright.”

Comment [sls4]: Perhaps not so likely that it will be passed, but not so unlikely that no one would propose it. Rep. Mary Bono Mack often approvingly quotes Jack Valente's assertion that copyright terms last forever minus a day.

[PK: Sections 303 and 304 deal with the copyright terms for works created before 1978. Since this term extension would apply retroactively, there would no longer be a need to distinguish between different term regimes from earlier statutes.]

SEC. 205.—SECONDARY LIABILITY

Section 501 is amended by inserting after subsection (f) the following:

“(g) a person has committed secondary infringement, and is liable as an infringer if:

- (1) that person induces infringement of a copyright; or
- (2) that person knows, or should have known, of an infringement and has facilitated the infringement in any manner or part.”

[PK: this appears to be based on contributory liability, rather than vicarious or induced. However, it is a broader formulation than has been set out by the courts.]

SEC. 206.—TERTIARY LIABILITY

Section 501 is amended by inserting after subsection (g) the following:

“(h) a person has committed tertiary infringement, and is liable as a secondary infringer if:

- (1) that person induces secondary infringement of a copyright; or
- (2) that person knows, or should have known, of a secondary infringement and has facilitated the secondary infringement in any manner or part.”

SEC. 207.—MODERNIZING FAIR USE

(a) Section 107 of title 17, United States Code, is repealed.

(b) Chapter 5 of title 17, United States Code, is amended by adding at the end a section 514, which shall read as follows:

“**Section 514. Limitations on liability ; Fair use**

Notwithstanding the provisions of sections 106, 106A and 106B, the fair use by an **accredited library or archives** of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as news reporting, teaching, scholarship, or research, shall not be subject to statutory damages. In determining whether the use made of a work in any particular case is a fair use, a plaintiff or victim shall consider—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;

Comment [sls5]: Another farfetched proposal with a basis in reality. Judge Alex Kozinski of the 9th Circuit has suggested that satire should fall outside of fair use but with penalties limited to a proportion of profits earned by the satirist.
See:
http://alex.kozinski.com/articles/Whats_So_Fair_About_Fair_Use.pdf

Comment [sls6]: It's common for proposals that limit user rights to have a carve-out only for specific users like libraries and archives. All too often, these are the only institutions that a majority of legislators will recognize as good faith follow on users.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

[PK: Fair use is moved from its current position at section 107 and into a new section 514. The significance of this is that while sections in chapter 1 (the 100s) typically deal with the boundaries of what is and isn't copyright, sections in chapter 5 (the 500s) deal with penalties. In essence, fair use would now be an infringement of copyright, though one where the infringer would be liable for fewer damages.

However, fair use would only be available to accredited libraries and archives. These libraries and archives, moreover, would still be liable for monetary damages—just not statutory damages. They would have to pay actual damages to the copyright holder, as well as profits made from the infringement.

Also note that the four factors, while preserved, are to be considered not by the court, but by the rightsholder.]

SEC. 208.—MORAL RIGHTS

Section 106A of title 17, United States Code, is amended--

(a) by striking subsections (b), (c), and (e), and redesignating the remaining subsections accordingly; and

(b) in subsection (a) by striking “the author of a work of visual art” and inserting “the owner of a copyright”.

[Section 106A currently grants visual artists broader control over their works, including rights of attribution that cannot be reassigned, and the right to prevent certain alterations to the work.

This section of the bill broadens the scope of the rights, meaning that there are fewer, if any, exceptions to how the author might prevent alteration of the work.

The change also expands the scope of who can exercise the rights. Whereas current law only grants these rights to the actual creators of visual works, the bill would allow the copyright holder of any work to prevent alteration. This would seem to preclude remixing any media, including film, photos, or music.]

SEC. 209.—SCOPE OF COPYRIGHT

Section 102 of title 17, United States Code, is amended:

(a) by inserting after paragraph (8) the following:

“(9) broadcasts;
“(10) databases;
“(11) fashion designs; and
“(12) auto parts.”

- (b) by striking subsection (b) and inserting the following:
“(b) for the purposes of determining originality of fashion designs, the Secretary of Intellectual Property shall select an Originality Czar.”
- (c) until such time as a Secretary of Intellectual Property may be appointed and confirmed, a representative of the Bravo Network shall serve as Acting Originality Czar.

Comment [sls7]: See the WIPO Broadcast Treaty, as well as the Rome Convention:
<http://www.publicknowledge.org/issues/wipobroadcasters>

Comment [sls8]: Europe provides protection for databases beyond what US copyright allows. See
<http://www.bitlaw.com/copyright/databases.html#directive>

Comment [sls9]: An issue that keeps getting proposed in Congress:
<http://www.publicknowledge.org/search/node/fashion>

Comment [sls10]: Seriously discussed in hearings in February 2008:
<http://www.publicknowledge.org/node/1399>

[PK: new types of material are added to the scope of copyrightable works, such as broadcasts and databases. It should be noted that these materials do receive IP protection in other countries.]

Currently, subsection (b) of section 102 states that ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries cannot be copyrighted. This section repeals that language.]

TITLE III.—ENHANCEMENTS TO INTELLECTUAL PROPERTY ENFORCEMENT

SEC. 301.—FORFEITURE IN CRIMINAL COPYRIGHT INFRINGEMENT

(a) FORFEITURE AND DESTRUCTION; RESTITUTION.—Section 506(b) of title 17, United States Code, is amended to read as follows:

“(b) FORFEITURE, DESTRUCTION, AND RESTITUTION. Forfeiture, destruction, and restitution relating to this section shall be subject to section 2323 of title 18, to the extent provided in that section, in addition to any other remedies provided by law.”

(b) SEIZURES AND FORFEITURES.—

- (1) REPEAL.—Section 509 of title 17, United States Code, is repealed.
(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 5 of title 17, United States Code, is amended by striking the item relating to section 509.

[PK: current copyright forfeiture proceedings are governed in part by section 509. This provision removes that section and instead has forfeitures governed by a newly created 18 USC § 2323 (see explanation in section 303).]

Comment [sls11]: Not a joke: Taken verbatim from S. 2317, the IP Enforcement Act of 2007, the Senate companion bill to the PRO IP Act.

SEC. 302.—FORFEITURE IN UNAUTHORIZED RECORDING OF MOTION PICTURES

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

"(b) FORFEITURE, DESTRUCTION, AND RESTITUTION. Forfeiture, destruction, and restitution relating to this section shall be subject to section 2323 of title 18, to the extent provided in that section, in addition to any other remedies provided by law."

[PK: This section also removes existing forfeiture procedures for bootlegging movies and places them in a new 18 USC §2323 (see explanation in section 303).]

Comment [sls12]: Taken verbatim from S. 2317, the IP Enforcement Act of 2007, the Senate companion bill to the PRO IP Act.

SEC. 303.—FORFEITURE, DESTRUCTION, AND RESTITUTION

(a) IN GENERAL.—Chapter 113 of title 18, United States Code, is amended by adding at the end the following:

"§2323. Forfeiture, Destruction, and Restitution

"(a) Civil Forfeiture-

"(1) PROPERTY SUBJECT TO FORFEITURE- The following property is subject to forfeiture to the United States:

"(A) Any article the making or trafficking of which is prohibited under section 506 or 1204 of title 17, or section 2318, 2319, 2319A, 2319B, or 2320, or chapter 90, of this title.

"(B) Any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of an offense referred to in subparagraph (A).

"(C) Any property constituting or derived from any proceeds obtained directly or indirectly as a result of the commission of an offense referred to in subparagraph (A).

"(2) PROCEDURES- The provisions of chapter 46 relating to civil forfeitures shall extend to any seizure or civil forfeiture under this section. At the conclusion of the forfeiture proceedings, unless otherwise requested by an agency of the United States, the court shall order that any property forfeited under paragraph (1) be destroyed, or otherwise disposed of according to law.

"(b) Criminal Forfeiture-

"(1) PROPERTY SUBJECT TO FORFEITURE- The court, in imposing sentence on a person convicted of an offense under section 506 or 1204 of title 17, or section 2318, 2319, 2319A, 2319B, or 2320, or chapter 90, of this title, shall order, in addition to any other sentence imposed, that the person forfeit to the United States any property subject to forfeiture under subsection (a) for that offense.

"(2) PROCEDURES-

"(A) IN GENERAL- The forfeiture of property under paragraph (1), including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by the procedures set forth in section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), other than subsection (d) of that section.

"(B) DESTRUCTION- At the conclusion of the forfeiture proceedings, the court, unless otherwise requested by an agency of the United States--

"(i) shall order that any forfeited article or component of an article bearing or consisting of a counterfeit mark be destroyed or otherwise disposed of according to law; and

"(ii) shall order that any infringing items or other property described in subsection (a)(1)(A) and forfeited under paragraph (1) of this subsection be destroyed or otherwise disposed of according to law.

"(c) Restitution- When a person is convicted of an offense under section 506 or 1204 of title 17 or section 2318, 2319, 2319A, 2319B, or 2320, or chapter 90, of this title, the court, pursuant to sections 3556, 3663A, and 3664 of this title, shall order the person to pay restitution to any victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii) of this title."

(b) Technical and Conforming Amendment- The table of sections for chapter 113 of title 18, United States Code, is amended by adding at the end the following:

"2323. Forfeiture, destruction, and restitution."

Comment [sls13]: No jokes here. This is also verbatim from S. 2317. Note that this goes beyond what's in the House's PRO IP Act—it includes forfeitures for materials used in circumventing DRM.

[PK: This section requires courts to confiscate any goods or devices remotely connected to the creation of: works that infringe copyright; bootleg movies; counterfeit goods; audio bootlegs; and devices that circumvent DRM.]

SEC. 304.—INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS

Section 2516(1)(c) of title 18, United States Code, is amended—

by striking "sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property)" and inserting "sections 2312, 2313, 2314, and 2315 (relating to interstate transportation of stolen property), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2319B (relating to unauthorized recording of motion pictures in a motion picture exhibition facility), section 2320 (relating to trafficking in counterfeit goods or services) "

Comment [sls14]: Not a joke: The highlighted portion here is taken verbatim from the Justice Department proposal that has been submitted to Congress several times and is the basis for the PRO IP Act and the IP Enforcement Act.

[PK: This adds copyright infringement and audio and video bootlegging to the list of offenses for which the government may apply for a wiretap warrant.]

SEC. 305.—INCREASED STATUTORY DAMAGES

Section 504(c) of title 17, United States Code, is amended—

(1) in paragraph (1) by striking "in a sum of not less than \$750 or more than \$30,000 as the court considers just" and inserting "in a sum of not less than \$1,000 or more than \$40,000";

(2) in paragraph (2) by striking the first sentence and inserting "In a case where the infringement was committed willfully, the court shall provide an award of statutory damages not less than \$2,000, and may in its discretion increase the award of statutory damages to a sum of not more than \$200,000";

(3) by inserting after paragraph (3) the following:

"(4) In a case where the infringement was committed upon a digital work, or where the infringement involved conversion of the work into a digital format, the court shall provide an award of statutory damages not less than \$2,000, and may in its discretion increase the award of statutory damages to a sum of not more than \$200,000."

[PK: Paragraph (1) increases statutory damages from the \$750 to \$30,000 range to a range between \$1,000 and \$40,000.

Paragraph (2) increases the statutory damages cap for willful infringement from \$150,000 to \$200,000, and places a minimum damages amount on willful infringement at \$2,000.

Paragraph (3) provides a new method of increasing statutory damages, in any case where a digital work was infringed, or where a work was converted into a digital format.]

SEC. 306.—COMPUTATION OF STATUTORY DAMAGES IN COPYRIGHT CASES

Section 504(c)(1) of title 17, United States Code, is amended by striking the second sentence and inserting the following:

"A copyright owner is entitled to recover statutory damages for each copyrighted work sued upon that is found to be infringed. The court may make either one or multiple awards of statutory damages with respect to infringement of a compilation, or of works that were lawfully included in a compilation, or a derivative work and any preexisting works upon which it is based. In making a decision on the awarding of such damages, the court may consider any facts it finds relevant relating to the infringed works and the infringing conduct, including whether the infringed works are distinct works having independent economic value."

Comment [sls15]: "Digital is different" is a cry that appears too often on the Hill, and too often is accepted uncritically. The assumption is that a digital copy is far more vulnerable than an analog one because it creates a "perfect copy." This distinction, while not trivial, still often fails to explain the far greater restrictions placed upon uses of digital works.

Comment [sls16]: Not a joke: Taken essentially verbatim from the introduced version of the PRO IP Act.

[PK: This allows a court to multiply statutory damages by the number of works in a compilation or a derivative work. Currently, an infringed compilation merits one award of statutory damages. This amendment would allow that award to be multiplied by, for instance, the number of photos in a magazine or the number of tracks on a record album.]

SEC. 307.—SELF-HELP FOR RIGHTSHOLDERS

Section 506 of title 17, United States Code, is amended by inserting after subsection (f) the following:

"(g) Self-Help for Copyright Owners.—Notwithstanding any provision of any state or federal laws, including sections 1029, 1030, 1362, 2511, 2512, 2701, 2710, and 3121 of title 18, United States Code; the holder of a copyright, or a person authorized by the copyright holder—

(1) may disable, interfere with, block, divert, or otherwise impair the unauthorized exercise of any of the exclusive rights granted to the copyright holder under section 106 or 106A of title 17, United States Code;

(2) may remove or destroy any infringing work, portion thereof, from the property or premises of an alleged infringer;

(3) may seize, disable, or destroy any property used, or intended to be used, in any manner or part, in the infringement of the copyright; and

(4) shall not be held liable in any civil or criminal action arising out or connected to of any activities under this subsection."

[PK: the notwithstanding clause insulates rightsholders from any lawsuit related to them hacking into alleged infringers' computers, or, it would seem, also entering their physical property to remove infringing material. The former seems to be the primary intent, given that the referenced sections of title 18 deal with computer crimes such as wiretapping or accessing stored communications.]

SEC. 308.—LIMITATIONS ON LIABILITY RELATING TO MATERIAL ONLINE

Section 512 of title 17, United States Code, is amended:

(a) in subsection (i)--

(1) by striking subparagraph (A) and inserting the following:

“(A) has adopted and implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination of subscribers and account holders of the service provider's system or network who are repeat infringers”

(2) by striking paragraph (2) and inserting the following:

“(2) Definitions. As used in this subsection:

Comment [sls17]: A few years ago, Senator Hatch advocated destroying the computers of file sharers: <http://www.politechbot.com/p-04859.html>
And Representative Berman actually introduced a bill allowing content owners to hack alleged infringers' computers—though that proposal was at least a teeny bit more nuanced than this one: <http://blogs.oreilly.com/digitalmedia/2002/09/p2p-hacking-bill-berman-speaks.html>
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h5211ih.txt.pdf

Comment [sls18]: More and more, the content industry is proposing that ISPs, and not just content hosts, be responsible for infringement that occurs on tier networks. Proposals range from requiring automated network filtering to a French-style "3 strikes" proposal. Some proposals have included a "blacklisting" provision that would seem to kick accused infringers off the Internet entirely.

“(A) the term "standard technical measures" means technical measures that are used by copyright owners to identify or protect copyrighted works.

“(B) the term “termination” means the cancellation of any account allowing access to the service, as well as the listing of the user in a registry indicating persons who are to be prevented from ever again accessing online services.”

(c) by striking subsections (f), (g), and (m) and redesignating subsections (h) through (n) accordingly.

[PK: Section 512 of title 17 is the famous "DMCA safe harbor" provision that allows ISPs and other service providers to escape monetary liability for infringement committed by others on their networks.

Currently, section 512(i) requires that service providers implement technical measures against infringement, though those technical measures must be developed through an open, consensus-based process, and can't be overly burdensome. This provision removes those limits on technical measures, meaning providers must implement them regardless of cost.

The bill also provides a new definition of "termination," meaning that repeat offenders ust not only have accounts cancelled, but will be blacklisted form using the service ever again. Depending on the service offered by the provider, this could mean an infringer will be banned from the Internet permanently.

Subsection (f) prohibits misleading takedown notices. Subsection (g) governs putback notices. Subsection (m) states that service providers do not have to violate privacy to benefit from the safe harbor. All these are repealed.]

SEC. 309.—LIMITATIONS ON CIVIL ACTIONS FOR ISSUERS OF NOTICES

(a) Limitations-

No civil or criminal action can be brought in any court in the nation under the provisions of section 202 of the Digital Millennium Copyright Act which were formerly codified under section 512(f) of title 17, United States Code.

(b) Civil Actions in State Court- The Federal Government has the power to demand that State Court actions are removed to Federal Court, where they will be dismissed.

(c) Retroactive Application—this provision shall apply to any action brought at any time under the provisions of section 202 of the Digital Millennium Copyright Act which were formerly codified under section 512(f) of title 17, United States Code

[PK: This provision would immunize from lawsuit anyone who has violated the current 512(f) provision on false takedown notices.]

SEC. 310.—MODERNIZING DEFINITION OF PIRACY

Section 506(a)(1) is amended by striking “shall be punished as provided under section 2319 of title 18,” and inserting “is a pirate under the law of nations, and shall be punished as provided under sections 2319 and 1651 of title 18,”

[PK: This section defines copyright infringement as a type of piracy, and thus applies not only the criminal penalties of 18 USC § 2319 to criminal copyright infringement (as current law does); it also applies 18 USC §1651, which has traditionally governed piracy.]

There may be serious separation of powers or international jurisdiction questions about legislation purporting to alter definitions of "the law of nations." This requires further analysis.]

TITLE IV.—ADDITIONAL TECHNOLOGICAL PROTECTION MEASURES

SEC. 401.—ADOPTION OF SECURITY SYSTEM STANDARDS AND ENCODING RULES

(a) Private Sector Efforts-

(1) The FCC, Copyright Office, and content owners shall develop a security standard which is

- (A) reliable;
- (B) renewable;
- (C) resistant to attack;
- (D) readily implemented;
- (E) modular;
- (F) applicable to multiple technology platforms;
- (G) extensible;
- (H) upgradable;
- (I) not cost prohibitive;
- (J) invincible; and
- (K) any software portion of such standards is based on open source code.

Comment [sls19]: The outline of this section was taken from a bill by Senator Hollings in 2002, called S.2048. That bill would have required DRM on all digital media devices. As silly as this section of the APRIL act is, it's not too far from the real thing.
http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s2048is.txt.pdf

(2) this standard shall be known hereinafter as Dragon Shield

(b) Liability

(1) any manufacturer who creates and/or distributes a device which does not incorporate Dragon Shield shall be liable for all illicit copies of content made on that device. The fact that a manufacturer omitted Dragon Shield to enable fair uses shall result in double damages.

SEC. 402.—PROHIBITION ON SHIPMENT IN INTERSTATE COMMERCE OF NONCONFORMING DIGITAL MEDIA DEVICES

(a) IN GENERAL- A manufacturer, importer, or seller of digital media devices may not—

(1) sell any device that does not comply with Dragon Shield; or

(2) purchase a device from a country that has not implemented dragon shield and try and bring that device into the United States for sale or use. Damages shall be doubled if the purchase of the device was motivated by a desire to experience content from a country that does not recognize Dragon Shield.

(b) EXCEPTION- Devices manufactured before the creation of Dragon Shield may be sold without Dragon Shield. However, as all content must now have Dragon Shield protection, those devices shall not be able to use any content.

SEC. 403.—PROHIBITION ON REMOVAL OR ALTERATION OF SECURITY TECHNOLOGY; VIOLATION OF ENCODING RULES; DELETION FOR SECURITY INTEGRITY

(a) REMOVAL OR ALTERATION OF SECURITY TECHNOLOGY- No person may—

(1) remove Dragon Shield;

(2) distribute material without Dragon Shield; or

(3) instruct others on the removal of Dragon Shield.

(b) ENCODING RULES – No person may create content which does not incorporate Dragon Shield

(c) DELETION FOR SECURITY INTEGRITY

(1) All content without Dragon Shield shall be deleted in order to preserve nationwide digital security.

(A) It is recommended, but not required, that content owners offer discounts to users who wish to repurchase their content collections in a form that is protected by Dragon Shield.

SEC. 404.—NOT FOUND

SEC. 405.—DAMAGES.

A court may award damages for each violation of section 403(b) of not less than \$200 and not more than \$2,500, as the court considers just. If the court considers damages less than \$200 to be just, the court is out of luck.

[PK: the reference to "Section 403" may be a drafting error; the provisions of title IV would likely be codified into another chapter of title 17.]

TITLE V.—COPYRIGHT IN GOVERNMENT WORKS

SEC. 501.—COPYRIGHT IN GOVERNMENT WORKS

(a) In General-- Section 105 of title 17, United States Code, is repealed.

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