

VIA FACSIMILE: _____

September 10, 2008

Senator _____
United States Senate
Committee on the Judiciary

Re: Concerns Regarding S. 3325, the Enforcement of Intellectual Property Rights Act of 2008

Dear Senator,

The undersigned groups write to express our concerns with S. 3325, the Enforcement of Intellectual Property Rights Act of 2008, soon to be marked up in the Committee on the Judiciary. While enforcing IP rights is necessary to ensuring the progress of science and the useful arts, an unbalanced approach to enforcement would lead to unintended harms and impede that progress. Several of the provisions contained within S. 3325 threaten such an imbalance.

Civil Enforcement by DOJ

Section 101 of the bill allows the Attorney General to bring a civil suit against alleged copyright infringers in lieu of a criminal action. Granting the Attorney General this authority is unwarranted. The Attorney General currently possesses the power to bring criminal actions against the worst infringers, while civil remedies are already fully and freely available to copyright holders.

Section 101 would be an enormous gift of federal resources to large copyright owners with no demonstration that the copyright owners are having difficulties enforcing their own rights. For example, the recording industry has threatened or filed over 30,000 lawsuits against individual consumers. Movie and television producers, software publishers, music publishers, and print publishers all have their own enforcement programs. There is absolutely no reason for the federal government to assume this private enforcement role.

Moreover, in a civil action brought by the government, the defendant loses many of the protections he possesses in a criminal action. The government's burden of proof is lower – preponderance of evidence rather than beyond reasonable doubt. Additionally, the defendant is not eligible for free legal representation if necessary. Nor does the bill adequately balance this shift against the accused. The proposed offset for civil damages is limited to certain cases, and the bill also explicitly permits the United States and private parties to exact further civil or criminal penalties in addition to those imposed by the Attorney General's civil suit.

Given its potential harms, section 101's inclusion should be reconsidered. At the very least, substantial examination is needed to assess its unintended, adverse consequences.

Forfeiture Provisions

Title III of S. 3325 expands both the civil and criminal forfeiture provisions of several areas of IP and related law. Unlike similar provisions in H.R. 4279, the civil forfeiture provisions here do not require that the seized property be owned or predominantly controlled by the infringer. Given the distributed nature of online content and Internet communications, this provision subjects the property of unaffiliated, noninfringing third parties, such as online service providers, to forfeiture.

At least two major questions are left unanswered by these provisions. First, to what extent is the information on seized devices reached by the forfeiture? For instance, if an information storage device such as a server is forfeited, is the proprietary content (including copyrighted content) on that server similarly forfeit? Virtual bystanders storing copyrighted material on the same server as an infringer should not have their intellectual property seized by the government due to the operation of a pro-IP law.

Second, what rights are implicated by accessing the information stored on seized devices? If an information storage device such as a server is forfeited, does the government require a search warrant to review the contents of the server? If not, then forfeiture and impoundment could be used as a mechanism to circumvent the warrant requirement.

Furthermore, S. 3325 authorizes forfeiture for the circumvention of technological protection measures. This provision only serves to heighten the ongoing controversy over anti-circumvention provisions—which currently may penalize users who are circumventing protection measures to make fair or other lawful uses of copyrighted works.

Impounding of Records

Section 202 of the bill allows the impounding of business records associated with an alleged infringement pending trial. By allowing the impoundment of the actual records soon after the filing of a complaint, this amendment deprives the defendant the ability to carry on its business before a decision of the merits of the complaint—before any injunction is issued or any discovery undertaken. Moreover, without the records, the defendant might not be able adequately to prepare a defense. S. 3325 is worse than the parallel provision in H.R. 4279 because the Senate bill makes a protective order for these records discretionary, while the House bill makes the protective order mandatory

The expeditious procedures currently in 17 U.S.C. § 503 may be necessary to prevent potentially infringing materials from entering the market. However, expanding the section's scope to include records does nothing to further that goal, while circumventing established discovery procedures.

We look forward to working with the Committee to address our concerns with S. 3325.

Respectfully submitted,

American Association of Law Libraries
American Library Association
Consumer Federation of America
Consumers Union
Digital Future Coalition
Electronic Frontier Foundation
Essential Action
IP Justice
Knowledge Ecology International
Medical Library Association
Public Knowledge
Special Libraries Association

cc: Members of the Senate Committee on the Judiciary