CRS Report for Congress

Online Service Provider Copyright Liability: Analysis and Discussion of H.R. 2180 and S. 1146

Updated April 14, 1998

Dorothy Schrader
Senior Specialist
American Law Division

Congressional Research Service • The Library of Congress

ABSTRACT

One of the major public policy issues relating to the future development of the Internet and other computer networks concerns the scope of copyright protection against unauthorized uses of copyrighted material on such networks. A subsidiary issue concerns the copyright liability of online service and access providers (OSPs) for the infringing acts of third party customers or users of OSP facilities or services. This report summarizes and analyzes the OSP liability proposals of two pending bills (Title I of S. 1146 and H.R. 2180) that would generally exempt from copyright liability those OSPs which act as mere conduits of Internet traffic.

Online Service Provider Copyright Liability: Analysis and Discussion of H.R. 2180 and S. 1146

Summary

The Internet and other computer networks provide, in the judgment of most experts, unparalleled opportunities for worldwide communications and economic growth. It is also generally agreed that, in order to utilize this potential fully, many difficult technical and legal policy issues must be confronted and resolved. One of these policy issues concerns the scope of protection for copyrighted works against unauthorized copying or other unlawful use. A subsidiary issue concerns the copyright liability of online service providers ("OSPs") for the infringing acts of third party customers or users of OSP facilities or services.

Under existing copyright law, direct infringers are held to a standard of strict liability, generally without regard for the intent of the actor. Even apart from master-servant principles, a person may be held vicariously or contributorily liable for the infringements of another, under judicially-developed doctrines.

In December 1996, two new international treaties were developed that are intended to clarify and/or expand the rights of copyright owners in digital, electronic environments. These treaties are known as the World Intellectual Property Organization ("WIPO") Copyright and Performances and Phonograms Treaties. Other than an agreed interpretation that mere provision of communications facilities or services is not infringing, the treaties are silent on who is liable for infringement of treaty rights. The treaty implementation bills recommended by the President (S. 1121 and H.R. 2281) do not address who is liable for infringement of treaty rights.

S. 1146, an alternative treaty implementation bill, addresses the issue of copyright liability of OSPs generally by exempting from copyright liability persons who act as "mere conduits" in transmitting copyrighted material. H.R. 2180 like S. 1146 generally exempts OSPs when acting as "mere conduits."

Telephone companies, online access and service providers, libraries and many educational institutions, and companies that provide browsing, navigational, and search capabilities generally support the OSP liability bills in principle. They argue that OSP liability legislation must be passed in conjunction with any legislation implementing the WIPO treaties. Rightsholders generally oppose any link between approval and implementation of the WIPO treaties and OSP liability legislation. They generally believe existing copyright law is adequate to deal with OSP liability.

This report summarizes and analyzes the OSP liability provisions of S. 1146 and H.R. 2180 and notes arguments for and against these provisions.

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Online Service Provider Copyright Liability: Analysis and Discussion of H.R. 2180 and S. 1146

The Internet and other computer networks provide, in the judgment of most experts, unparalleled opportunities for worldwide communications and economic growth. It is also generally agreed that, in order to tap this potential fully, many difficult technical and policy issues must be confronted and resolved. One of these policy issues concerns the scope of protection for copyrighted works against unauthorized copying or other unlawful use. A subsidiary copyright policy issue concerns the liability of online service providers ("OSPs")[1] for the infringing acts of third party customers or users of OSP facilities or services.

The general issues relating to Internet uses of copyrighted material are implicated by two new international intellectual property treaties and the bills intended to implement the obligations of the treaties. The President in July 1997 submitted to the Senate, for its advice and consent to ratification, the World Intellectual Property Organization ("WIPO") Copyright Treaty and the WIPO Performances and Phonograms Treaty. Based on the Administration's recommendations for implementing legislation, S. 1121 and H.R. 2281 were introduced at the end of July 1997. The bills would make the minimal changes in United States copyright law that the Administration believes are needed to make United States law consistent with the obligations of the treaties.[2]

The Administration's WIPO treaties implementation bills address two substantive issues — protection against circumvention of anti-copying systems and protection against removal or alteration of copyright management information. They do not address any of the other copyright policy issues that arguably are implicated by the treaties such as OSP copyright liability for contributory or vicarious infringements by third parties, the scope of the exclusive rights granted by the treaties (especially those

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[1] This Report has elected to use the phrase "online service provider" to refer to various activities of providing service or access to the Internet and other computer networks. Others use the terminology "Internet service providers" (ISP) or "Internet access providers" (IAP), or a combination of the two phrases. In this Report, "OSP" is used as a short-hand designation for persons or companies who transmit, route, provide connections and access, or otherwise facilitate computer network transmissions without initiating or altering the content of the transmission. These service or access providers include telephone companies, providers of browsing, navigational, and search engine services, some libraries and educational institutions, online services, and other network facilitators.

[2] For an overview of the WIPO treaties and the Administration's proposed implementing legislation, see D. Schrader, World Intellectual Property Organization Copyright Treaty: An Overview, CRS Report No. 97-444 A and World Intellectual Property Organization Performances and Phonograms Treaty: An Overview, CRS Report No. 97-523 A.

relating to reproduction, distribution, "transmission," and "public communication"), and the limitations on rights (such as fair use, ephemeral copying, and distance learning).

An alternative WIPO treaties implementation bill, S. 1146, does address several Internet copyright policy issues, including OSP liability. Also, H.R. 2180 deals with OSP liability, separate from implementation of the WIPO treaties.

This report summarizes and analyzes the OSP liability provisions of S. 1146 and H.R. 2180 and notes arguments for and against these provisions.

Background

NII Recommendations and Bills

The White House Information Infrastructure Task Force convened a Working Group on intellectual property issues ("IP Working Group"), which examined the Internet copyright policy issues and issued its final report and recommendations in September 1995.[3] In the course of its meetings and deliberations, the IP Working Group heard from rightsholders, OSPs, libraries, educational institutions and others about OSP copyright liability. The IP Working Group rejected the proposals from the OSPs for amendments to the copyright law to clarify OSP liability.[4] The Working Group recommended no amendments that would address the issues of contributory or vicarious infringement liability in the context of the Internet or national information infrastructure ("NII").

Under existing copyright law, direct infringers are held to a standard of strict copyright liability, generally without regard for the intent of the actor.[5]
OSPs apparently acknowledge that they are liable for their own direct infringements. Under judicially-developed doctrines, someone who has the right and ability to control the infringer's actions and a financial interest in the use of the copyrighted work may be held vicariously liable.[6] Also, someone who, with knowledge of

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[3] DEPARTMENT OF COMMERCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS OF THE INFORMATION INFRASTRUCTURE TASK FORCE (September 1995) (hereafter: the "IP Working Group Report").

[4] Basically, the OSPs argued for a higher standard of knowledge or a greater ability to control the infringing conduct to trigger their copyright liability than is arguably required by the existing copyright doctrines of vicarious or contributory infringement.
IP Working Group Report at 122-124.

[5] Willful, intentional infringement, however, may subject the infringer to a higher statutory damages cap of $100,000 rather than the $20,000 statutory damages cap for ordinary infringement.

[6] Shapiro, Bernstein & Co. V. H.L. Green Co., 316 F.2d 304 (2d Cir. 1962).

possible infringing activity, induces, causes, or materially contributes to an infringement, may be held liable as a contributory infringer.[7]

A manufacturer, however, generally has the freedom to market any device that is capable of substantial noninfringing uses, without incurring contributory infringement liability.[8]

Acting upon the recommendations of the Administration's IP Working Group Report, bills were introduced in the 104th Congress (S. 1284 and H.R. 2441) to make changes in the copyright law related to Internet uses of copyrighted works. These bills contained no provisions concerning the copyright liability of OSPs. Hearing were held on the bills, but no further action occurred.

Under the auspices of the House Subcommittee on Courts and Intellectual Property, a series of negotiating meetings was held in 1996 in an attempt to reach a compromise solution on OSP copyright liability. Participants included OSPs, telephone companies, library and educational interests, book and music publishers, and motion picture companies.

According to one participant, the negotiations broke down about the details of the copyright owners' proposal for a system of "notice and take-down," under which copyright owners would notify OSPs of copyright infringements on the Internet and the OSP would then close down the infringing site. The parties could not agree on the obligatory nature of the "notice and take-down" system, the scope of the exemption for acting as a "mere conduit" in transferring information, and liability for hyperlinking and software access tools such as search engines and browsers.[9]

Although these private sector negotiations did not resolve the OSP liability issue, the issue was thoroughly explored in these discussions, and many of the ideas discussed were later included in the OSP liability bills introduced in the 105th Congress.

New WIPO Treaties and Implementation Bills

At a diplomatic conference in December 1996, delegates representing more than 125 countries adopted two new intellectual property treaties, known as the WIPO Copyright and WIPO Performances and Phonograms Treaties. The Copyright Treaty covers copyright protection for computer programs and for databases as intellectual works, and use of copyrighted works in digital, electronic environments, including transmissions over the Internet. The Performances and Phonograms Treaty covers

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[7] Gershwin Publishing Corp. V. Columbia Artists Management, Inc., 443 F.2d 1159 (2d Cir. 1971).

[8] Sony Corp. V. Universal City Studios, Inc., 464 U.S. 417 (1984) (the "Betamax" VCR case).

[9] Lutzker, Neither Aiding Nor Abetting, LEGAL TIMES, October 6, 1997, Special Report on Intellectual Property at 18, 20.

protection for performers and producers of sound recordings,[10] and tracks many of the rights extended to copyright subject matter under the Copyright Treaty.

Before the delegates agreed on the new treaties, they engaged in extensive discussions about, among other issues, the copyright liability of OSPs. In the end, the delegates followed international copyright practice in not spelling out in the text of the treaties who is liable.[11] The delegates formally adopted, however, an "agreed statement" to the effect that the mere provision of physical facilities to enable communications is not itself an act of communication — that is, merely providing telephone lines, modems, and other connections does not infringe the public communications right.[12]

In forwarding the two WIPO Treaties to the Senate for its advice and consent, the President has recommended implementing legislation that does not address the issue of OSP copyright liability. That is, S. 1121 and H.R. 2281 would make no change in the copyright law concerning the judicially-created standards under which an OSP might be held liable for copyright infringement.

Title I of an alternative implementation bill, S. 1146, contains provisions regulating the copyright liability of OSPs. Hearings were held on the general issue of OSP liability before the Senate Judiciary Committee on September 4, 1997.

H.R. 2180 also deals with OSP liability. Some of its provisions are similar to S. 1146's liability provisions, but the two bills are not companion bills. Hearings were held on OSP liability and treaty implementation issues before the House Subcommittee on Courts and Intellectual Property on September 16-17, 1997.

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[10] United States law uses the phrase "sound recordings" to describe the intellectual content of audio works that is the object of copyright protection. "Phonograms" is the international term commonly used to refer to protection of "sound recordings." Although the United States protects sound recordings under the copyright law, the majority of foreign countries protects phonograms under legal theories other than copyright. Most commonly, phonograms are protected under so-called related or neighboring rights.

[11] International copyright treaties have not traditionally included text that defines who is liable for infringement. Copyright treaties have generally specified rights and, to a lesser extent limitations on rights, without spelling out who is liable for violations of the treaty rights.

[12] The "agreed statement" was adopted as an interpretation of Article 8 of the Copyright Treaty. The statement reads as follows:

"It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty of the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2)."

Summary of the Osp Liability Bills

Digital Copyright Clarification and Technology Education Act of 1997 (S. 1146)

S. 1146 is an alternative bill to implement the two WIPO treaties. In comparison to the Administration's implementation bills (S. 1121 and H.R. 2281), S. 1146 proposes different statutory text with respect to circumvention of anti-copying technologies and removal or alteration of copyright management information.[13] The bill consists of three titles, of which only Title I (OSP liability) is analyzed in this Report.[14]

The bill would add a new section 512 to title 17 of the U.S. Code,[15] entitled "Liability relating to material on the Internet and on-line." OSPs who merely transfer information on computer networks without having any control of the content, are generally absolved from either direct, vicarious, or contributory copyright infringement liability. Of course, OSPs are liable if they initiate or generate the infringing transmission.

Notice and Take-down System. S. 1146 basically adopts the proposal referred to as "mandatory notice and take-down" when an OSP acts merely as a "conduit" for computer network communications.

For purposes of this "notice and take-down" procedure, an OSP qualifies for the possible exemption if it did not initiate the placement of the material on the network, did not determine the content of the material, and did not contract for placement of the specific material on the network. If these conditions are met, OSP liability depends upon notice of a possible infringement. OSPs have no liability without actual notice of an infringement and then only if they fail to act to take-down the allegedly infringing material. Copyright owners are expected to monitor and enforce their own rights under this bill, with cooperation from the OSPs through a notice system.

Upon receiving a notice of infringement that complies with statutory requirements,[16] an OSP is expected to remove, disable or block access for 10 days

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[13] Title III of H.R. 1146. For an analysis of these provisions of S. 1146, see CRS Report 94-444 A at 22-23. This Report concerns the OSP liability issue alone.

[14] Title II of H.R. 1146 proposes several amendments to the Copyright Act to update the limitations on the rights of the copyright owner in the context of digital, electronic uses of copyrighted works, especially in the case of libraries and educational institutions. Title III deals with the same WIPO treaties implementation issues as the Administration bills (except that S. 1146 does not include technical amendments relating to treaty relationships and eligibility of foreigners to claim copyright in the U.S.).

[15] The Copyright Act is codified as title 17 U.S.C.

[16] Among other requirements, the notice must describe the infringing material, give information about its location on the network, provide proof of copyright registration or an application for registration or a court order that the use is unlawful, contain a sworn statement

(continued...)

or until it receives a court order, to the extent blocking is technologically feasible and economically reasonable.

Employees or agents of a nonprofit educational institution, library or archives would enjoy a special exemption from the "notice and take-down" procedure. These persons are deemed not to have notice of infringement from the copyright owner if the person "reasonably believed (i) that the allegedly infringing use was a fair use ... or (ii) was otherwise lawful."[17]

Conduit Exemption. If the statutory conditions are satisfied, the "conduit" exemption applies to network service transmissions, private communications ("E-mail"), real-time communications services ("chat rooms" and "list-serves"), and to site-linking tools and navigational aids including a search engine or browser.

The bill does not apply only to OSPs. Any person acting as a "mere conduit" in transmitting material through an electronic communications system or network is exempt from direct, vicarious, or contributory infringement copyright liability. A person acts as a "conduit" with respect to "network services and facilities" when such person "transmits, routes or provides connections" on behalf of a system user provided the services are for the purpose of managing, controlling or operating a communications system or network and the "conduit" person does not generate, or make any material alteration of, the content in the course of the transmission.[18]

Limitation of Liability for Blocking Actions. An OSP who removes, disables, or blocks an allegedly infringing site upon statutory notice of infringement has no liability to the person whose site or material is blocked whether or not the material is infringing.

Redress for Wrongful Notifications. If someone materially misrepresents in a statutory notice that certain online material is infringing, relief may be obtained against that person by the actual copyright owner or the OSP. A federal or State court may award statutory damages of not less than $1000 and any actual damages, including costs and attorneys' fees.

Other Defenses Not Affected by Blocking or Non-blocking Actions. Whether or not an OSP removes, disables, or blocks allegedly infringing material shall not adversely bear upon any defense to copyright infringement. For example, the fair use defense of 17 U.S.C. §107 is not affected by any decision of an OSP to remove or not to remove alleged infringing material.

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[16](...continued)
that the notice of infringement is accurate, be signed physically or electronically by an authorized person, and be accompanied by any payment the Register of Copyrights determines is necessary to deter frivolous notices.

[17] Proposed addition to 17 U.S.C. at §512(b)(3)(B).

[18] Proposed addition to 17 U.S.C. in §512(a).

Regulatory Oversight. The Register of Copyrights would be authorized to issue regulations specifying additional information for inclusion in the statutory notice of infringement and shall issue a standard form for the notice in both electronic and hard copy formats. Failure to provide the additional information in the notice or to use the Copyright Office form, however, shall not invalidate the notice.

On-Line Copyright Liability Limitation Act (H.R. 2180)

Like Title I of S. 1146, the On-Line Copyright Liability Limitation Act (H.R. 2180) would add a new section 512 to the Copyright Act, title 17 U.S.C., to establish statutory standards for determining the copyright liability of online service and access providers (OSPs) and any other persons who engage in the exempt activities. The basic approach of the bills is similar and many provisions are common to both. These are not companion bills, however.

Major Differences Between S. 1146 and H.R. 2180. A major distinction is that H.R. 2180 would exempt qualifying OSPs from copyright liability in cases of direct or vicarious infringement, but not in cases of contributory infringement. If the OSP is found liable as a contributory infringer, however, the only remedy for the copyright owner would be an injunction to stop the infringement.

Other major differences are:

H.R. 2180 does not specifically include an exemption for private or real-time communications or for use of navigational tools such as search engines and browsers;

H.R. 2180 does not specify the content of the notice of infringement and does not specifically legislate a "notice and take-down" procedure;" and

H.R. 2180 does not fix a minimum statutory damages fine for material misrepresentations about infringing material online.

Summary of H.R. 2180. H.R. 2180 would establish a statutory standard to govern the copyright liability of OSPs. If the statutory conditions are met, this statutory standard replaces the judicially-created doctrine of vicarious infringement, and limits the remedy for contributory infringement to injunctive relief. The exemption from copyright liability depends upon the OSPs' level of control, participation in any infringing activity, and knowledge of the infringement. If the exemption does not apply, the doctrines of existing law relating to direct, vicarious, or contributory infringement will attach to the infringing conduct.

Exemption from Direct or Vicarious Liability. An OSP would be exempt from direct or vicarious liability based solely on transmitting or providing access to copyrighted material online if the OSP did not —

initiate placement of the material online;

generate, select, or alter the content;

determine the recipients of the material;

receive a direct financial benefit attributable to the infringement;

sponsor, endorse, or advertize the material;

and the OSP did not —

know or have an awareness by notice or other information that the material is infringing, or know or have an awareness that it is prohibited by law from accessing the material.

There is no affirmative obligation, however, to seek information about a possible copyright infringement online.

Limitation on Contributory Infringement Remedy. Under H.R. 2180, a court could find an OSP liable as a contributory infringer even if the OSP only engaged in the conduct of transmitting or providing access to material on-line and did not initiate the infringement, determine the recipients, receive a direct financial benefit, or otherwise engage in conduct that would disqualify it from the direct or vicarious liability exemption. Presumably, the court would make additional findings that the OSP had knowledge, or an awareness, of the possible infringing material and induced, caused, or materially contributed to the infringement.

If the OSP is held liable for contributory infringement, H.R. 2180 would limit the remedy to an injunction. Further, injunctive relief would be available "only to the extent that all acts required by such relief are technically feasible and economically reasonable to carry out."

Limitation of Liability for Blocking Actions. A person who removes, disables, or blocks an allegedly infringing site in response to information by notice or otherwise has no liability to the party whose site or material is blocked, whether or not the material is infringing.

Since H.R. 2180 does not specify a statutory notice of infringement, this limitation on liability is available on a broader basis than the similar provision in S. 1146 (which depends upon taking the blocking action pursuant to a statutory notice). Also, the limitation in H.R. 2180 is not limited by time — unlike the limitation in S. 1146 (which applies for 10 days or until the OSP receives a court order concerning the alleged infringement).

Redress for Wrongful Notifications. If someone knowingly materially misrepresents that certain online material is infringing, any person who relies on the misrepresentation may recover their damages, including costs and attorneys' fees. Recovery depends upon proof of damages since there is no mandatory fine.

By contrast, S. 1146 does not require a "knowing" misrepresentation. Also, S. 1146 sets a minimum statutory damage remedy of $1000.

Other Defenses Not Affected by Blocking or Non-blocking Actions. Whether or not an OSP removes, disables, or blocks access to allegedly infringing material shall not adversely bear upon any defense to copyright infringement. For example, the fair use defense of 17 U.S.C. §107 is not affected by any decision of an OSP to remove or not to remove the alleged infringing material.

Although H.R. 2180 expresses this principle in different language than the comparable provision in S. 1146, both bills seem to achieve the same result.

Arguments for and Against the OSP Copyright Liability Bills

Arguments in Favor

The basic principles of the OSP copyright liability bills are apparently supported by those companies and persons who might qualify for the exemptions from liability proposed by the bills.[19] These companies and persons include the telephone companies, online access and service providers, libraries and educational institutions, and some software companies (i.e., generally those who create linking, navigational, or browsing tools and protocols relating to interoperability of software). The viewpoints of these groups or interests are generally represented by the Ad Hoc Copyright Coalition and the Digital Future Coalition.[20]

Relationship to WIPO Treaties. A critical issue for the supporters of the OSP liability bills is that OSP liability must "be considered in conjunction with the legislation implementing the World Intellectual Property Organization treaties on digital copyright."[21] Supporters argue that OSP liability must be clarified because the WIPO treaties expand and elaborate on the rights of copyright owners in the digital environment. This expansion and elaboration increases the potential liability risk for OSPs and any other users of computer networks.[22]

Uniqueness of the Internet. Supporters of the OSP liability bills argue the "size, scope, and utility of the Internet differ so greatly from all previous media that analogies provide limited assistance when we ask how to accommodate the needs of

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[19] For example, MCI Communications Corporation supports the basic principles of H.R. 2180, although it may seek further improvements in the text, according to MCI's technology counsel, Tim Casey. MCI Proposes Private Sector Solutions on Internet Issues, National Journal's Congress Daily, July 21, 1997.

[20] These "coalitions" have overlapping memberships.

[21] Statement of George Vradenburg III, Senior Vice President and General Counsl of America Online, Inc. on behalf of the Ad Hoc Copyright Coalition, Hearing on OSP Copyright Liability [S. 1146] Before the Senate Judiciary Committee, 105th Cong., 1st Sess., September 4, 1997 (unpublished) at 6. Hereafter: "Senate Hearing on S. 1146."

[22] Id. At 6.

[OSPs] and copyright holders. What we need is a new set of norms."[23] Internet traffic consists of billions of discrete packets of digitized information or messages. The OSPs cannot prevent the infringements of third parties. Without clarifying legislation, it is argued, OSPs "risk being held liable for massive damages for copyright infringement prepetrated by individuals without the knowledge of the [OSP],"[24] given the nature of Internet operations and their worldwide scope.

Inadequacy of Existing Law. Existing law on OSP liability is unsettled and uncertain, according to supporters of the OSP liability bills. This uncertainty alone is "inimical to the growth of [the Internet]."[25] Even more troubling to supporters is the possible application of the contributory infringement doctrine to fix liability on the basis of "constructive knowledge" of an infringement. "If all courts applied a standard that contributory infringement exists only when the defendant had actual knowledge of the occurrence of copyright infringement, then USTA would not be troubled. Unfortunately however, some courts construe the knowledge requirement not as actual knowledge, but as constructive knowledge — meaning that had the defendant engaged in further investigation, it might have uncovered the infringing nature of the subject material."[26]

Unlike dance hall proprietors (who are generally liable for infringements of music performed on premises controlled by them), it is argued that it is unrealistic to hold OSPs to a requirement of investigating and monitoring the millions of messages that are transmitted simultaneously over the Internet.

Exemption for Mere Conduit Activity Is a Matter of Fairness. Supporters of the OSP liability bills argue that "Congress must make clear that service providers which act simply as a conduit for transmitting information are immune for third-party infringement. No other option is practical."[27] Liability for copyright infringement should fall, according to supporters of the pending bills, "on those who create an infringing work or on those who reproduce or perform it with actual knowledge of the infringement and who are capable, as a legal and practical matter, to do something about it. The innocent or powerless transmitter should not be held liable for infringing acts of others.... Fundamental fairness must limit the service provider's exposure."[28]

Shared Enforcement Responsibility Subject to Actual Notice to OSP. Copyright owners should take the lead in detecting copyright infringements and enforcing their rights in connection with uses of their works on the Internet,

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[23] Statement of Roy Neel, President and CEO, United States Telephone Association, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 3.

[24] Id. At 3.

[25] Id. At 5.

[26] Id. At 5.

[27] Statement of George Vradenburg III, Senate Hearing on S. 1146, at 5.

[28] Id. At 4-5.

according to OSP liability bill supporters. Copyright owners and OSPs can then cooperate and work together to protect copyrights against unauthorized Internet uses.

> Content owners must locate and identify infringing materials, and service providers must be willing to help remove them where it is legal and appropriate to do so. A balanced approach must also assure that any mechanisms designed to require or incent service providers to remove such materials from their systems be carefully designed to reflect important privacy, competitive and other interests of third parties, and to provide a speedy judicial resolution of infringment or fair use claims. System providers should be protected from any claims that removal of potentially infringing material was wrongful, and transmitters whose material is removed must have a speedy resolution of their claims of wrongful removal.[29]

Arguments Against the OSP Liability Bills

Opposition to the pending OSP liability bills and, perhaps, to any legislation on this subject comes from the copyright or content owners whose material is transmitted via the Internet and other computer networks. The Creative Incentive Coalition, comprising motion picture, software, newspaper, and sound recording companies (and other related interests), represents many of these opponents.

Under the auspices of the House Subcommittee on Courts and Intellectual Property, the private sector interests affected by the OSP liability issue held a series of negotiating meetings in 1996, at which ideas and proposals for a compromise solution to this copyright policy issue were explored. Although less formal discussions may continue, the collapse of the organized talks without reaching a compromise may affect the positions of the parties on this year's OSP liability bills. That is, the negotiating position of both sides may harden somewhat. Copyright owners, for example, may be less willing to consider any liability exemption for OSPs.

According to one participant in the 1996 negotiations, the copyright owner witnesses at the Senate hearing on S. 1146 "now stressed their opposition to any exemption legislation. They indicated that any such limitation on liability would remove the most important incentive that OSPs have to cooperate in containing infringements — the threat of litigation."[30]

WIPO Treaties Ratification Should Precede Any OSP Liability Legislation. While it is not always clear whether copyright owners oppose OSP liability legislation on principle or oppose the details of specific proposals, the critical point for copyright owners is that ratification of the WIPO treaties should not be held hostage to resolution of the OSP liability issue. The Creative Incentive Coalition argues that ratification of the WIPO treaties this year is needed to vindicate the United States'

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[29] Id. At 5-6.

[30] Lutzger, Neither Aiding Nor Abetting, Legal Times, October 6, 1997, Special Section on Intellectual Property at 18, 22.

"strong interest in protecting creative minds and the capital they represent.... The longer we delay the more we make it clear we don't give a damn."[31]

Opponents of the OSP liability bills argue that the United States must ratify the WIPO treaties quickly to maintain U.S. leadership in intellectual property protection. The OSP issue, it is argued, is too complex and controversial to be resolved in the implementing legislation. If this issue is considered, it will open the door to other complex issues, which will delay ratification of the treaties. If ratification of the WIPO treaties is delayed or even linked to OSP liability legislation, opponents argue this will be perceived abroad as a relaxation of U.S. copyright liability standards. "If we were to change our law to further limit the liability of OSPs and ISPs, the weakening of that worldwide chain of copyright protection would be a clear and present danger to a very substantial segment of our economy."[32]

Existing Copyright Liability Law Is Adequate. Copyright owners argue that the judge-made doctrines of vicarious and contributory infringement are working well and present no special problems for OSPs and the economic vitality of the Internet. They assert that the known facts "include no hard evidence that existing copyright law is imposing unreasonable or debilitating liability on OSPs and ISPs."[33] According to copyright owners, the "good news is that current copyright law appears, for now, to be flexible enough to handle the new, ever-changing technology of the Internet."[34]

Copyright owners argue that there have only been a handful of cases where the copyright liability of OSPs was at issue and that the one decision that resulted in an opinion favored the OSP.[35] One copyright owner representative has stated that it is not aware of any major cases being filed in the last year nor "of any instance where AOL, Bell Atlantic, Sprint, MCI, among others, have been sued for copyright infringement."[36]

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[31] Statement of Jack Valenti, Chairman of the Motion Picture Association of America, Coalition Calls for Ratification of Copyright Treaties in '97, National Journal's Congress Daily, September 15, 1997.

[32] Statement of Fritz Attaway, Senior Vice President, Government Relations and Washington General Counsel of the Motion Picture Association of America ("MPAA"), Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 11.

[33] Statement of Fritz Attaway, Washington General Counsel of the MPAA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 11.

[34] Statement of Cary Sherman, General Counsel of the Recording Industry Association of America ("RIAA"), Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 5.

[35] Id. At 6. The reference to one decision presumably is to the Netcom case, in which the district court held the OSP was not vicariously liable. Religious Technology Center v. Netcom, 907 F. Supp. 1361 (N.D. Cal. 1995). The district court reserved a decision, pending further proceedings, on the issue of contributory infringement.

[36] Statement of Daniel Burton, Vice President, Novell, on behalf of the Business Software Alliance ("BSA") and the Software Publishers Association ("SPA"), Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 5.

Internet Piracy Is the Crisis Issue — Not OSP Liability. Copyright owners argue that there is no evidence that "the absence of a firm rule on the copyright liability of network operators is in any way chilling the development of the Internet, investment in network-based operations, or new entrants into these markets. In fact, competition is thriving."[37] By contrast, copyright owners argue that "[t]here is hard, confirmable evidence that [the motion picture] industry alone is losing over $2 billion to pirates each and every year, and that piracy in the digital world will become even more costly."[38] The software industry asserts that it loses $12 billion each year to piracy.[39]

The rapid growth of the Internet, it is argued, "also means that the peril faced by [the recording] industry is of the same magnitude. Our sound recordings are easily copied to a computer hard drive...[and] can be `uploaded' to the Internet with the push of a button. ... And once the recordings are stored on servers on the Internet, they are available to be downloaded by millions of users."[40]

General Liability Immunity for OSPs Cannot Be Justified. Since, in the view of copyright owners, the current law provides a sound balance between their rights and limitations on rights, it is argued that "the copyright law should not be changed to create general immunities for providers of network services."[41] To copyright owners, "any proposal to exempt Internet Access Providers from copyright liability is a solution in search of a problem. We don't have a problem now. But if we try to legislate a solution, we must surely **will** have a problem in the future.... We need cooperation, not immunity."[42]

While he was not willing to support general immunity for OSPs, at least one copyright owner representative described specific activities that probably should not lead to liability: "caching by end-users should not create liability, because, in effect, such copies are implicitly licensed...; [where] the service provider is passively enabling distribution of a work...copyright liability should not result...; [and storage of e-mail] should not lead to liability, so long as the only service provided by the

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[37] Statement of Dan Burton, on behalf of BSA and SPA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 5.

[38] Statement of Fritz Attaway, Washington General Counsel of the MPAA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 11. This figure refers to total motion picture piracy — not just to piracy on the Internet.

[39] Statement of Dan Burton, on behalf of BSA and SPA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 4. This figure also is apparently a total for all software piracy — not only piracy on the Internet.

[40] Statement of Cary Sherman, on behalf of the RIAA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 3.

[41] Statement of Dan Burton, on behalf of BSA and SPA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 5.

[42] Satement of Cary Sherman, on behalf of the RIAA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 7.

operator of the system is to store the work pending retrieval."[43] This same representative, however, also argues that a "notice and take-down" system "is simply an unworkable model. ... [M]aking notice a precondition to suit is not a solution."[44]

Existing Law Encourages Cooperation Between OSPs and Copyright Owners. In addition to arguing that existing copyright law should not be changed because it represents a sound balance between rights and limitations on rights, copyright owners argue that the potential liability of OSPs fosters collaborative efforts to detect and stop copyright infringement. "An outright exemption from liability would **discourage** the IAPs from working with creators to avoid infringements."[45] Another copyright owner representative reported they have had "good experiences in obtaining the help and collaboration of network operators in removing and/or blocking access to infringing material. In part, we believe such collaboration is due to the incentives now provided by the copyright law for on-line services and other intermediaries to cooperate with software companies....[T]he ephemeral character of many pirate software sites makes it extremely difficult to take action against pirates without help from service providers."[46]

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[43] Statement of Dan Burton, on behalf of BSA and SPA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 7-8.

[44] Id. At 8-9.

[45] Statement of Cary Sherman, on behalf of the RIAA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 7.

[46] Statement of Dan Burton, on behalf of BSA and SPA, Senate Hearing on S. 1146, September 4, 1997 (unpublished) at 6.

Conclusion

Online service and access providers (OSPs) seek legislative clarification of their copyright liability for transmitting, routing, providing connections and access, and otherwise facilitating Internet and other computer network transmissions. Since Internet traffic consists of billions of discrete packets of digitized information or messages, OSPs argue that they cannot prevent infringements by third parties and should not be liable for third party infringements. Without clarifying legislation, OSPs argue that, in conducting routine Internet business, they are exposed to potentially massive damages for copyright infringement by third parties.

Two pending bills, Title I of S. 1146 and H.R. 2180, would generally exempt from copyright liability those OSPs who act as "mere conduits" and do not generate, initiate, or modify the content of the transmissions. The principles of these bills are generally supported by the telephone companies, libraries and many educational institutions, and many Internet browser, navigational, and search engine companies,[47] as well as the online service and access providers.

These groups also argue that OSP liability legislation must be included in, or enacted in conjunction with, any bills implementing United States adherence to the WIPO Copyright and Performances and Phonograms Treaties. Since, according to these groups, the WIPO treaties expand and elaborate on rights of copyright owners in the digital environment, legislation is needed to balance the expansion of rights, which increases the potential liability risk for OSPs.

The specific OSP liability bills now pending are opposed by rightsholders, including motion picture and sound recording producers, book and music publishers, and many software companies. Rightsholders argue that existing copyright law is working well to define who is liable for infringing uses of copyrighted works on the Internet. They argue that there is no evidence that OSPs have been subject to unreasonable or debilitating liability under the existing doctrines of vicarious and contributory infringement.

The real crisis, according to rightsholders, is rampant piracy on the Internet and elsewhere; therefore, the WIPO Treaties should be ratified and implemented without attempting to change existing law concerning OSP liability. Rightsholders urge early action to approve the WIPO Treaties and enact the implementing legislation in order to maintain United States leadership in intellectual property internationally, and to encourage other countries to improve protection for copyrighted materials in digital, electronic environments. Since the United States is a global leader in producing the hardware and software needed to conduct Internet businesses, early approval of the treaties will benefit the U.S. economy, according to rightsholders.

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[47] Many of these groups at least sometimes engage in Internet transmission activities and might also qualify for the "conduit" exemption from liability.