Calendar No. 437

102D CONGRESS
2d Session

SENATE

REPORT
102-268

CRIMINAL SANCTIONS FOR VIOLATION OF SOFTWARE COPYRIGHTS

APRIL 7 (legislative day, MARCH 26), 1992.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 893]

The Committee on the Judiciary, to which was referred the bill (S. 893) to amend title 18, United States Code, to impose criminal sanctions for violations of software copyrights, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE

S. 893 will amend title 18 of the United States Code to increase the penalties for violations of copyrights in computer software. Under current law, piracy of computer software is a misdemeanor offense. This bill will elevate the offense to a felony.

II. LEGISLATIVE HISTORY

Senator Hatch introduced S. 893 on April 23, 1991. The bill was cosponsored by Senators DeConcini and Gorton and referred to the Committee on the Judiciary. The committee's Subcommittee on

Patents, Copyrights and Trademarks, which Senator DeConcini chairs, approved the bill for full committee consideration on July 25, 1991. On August 1, 1991, by unanimous consent, the Judiciary Committee ordered S. 893 favorably reported.

III. Discussion

The world market for computer software is currently estimated at $70 billion per year. The Commerce Department has predicted that this figure could increase to $1 trillion by the year 2000. U.S. companies now hold a 70-percent share of the world software market, generating about $50 billion in sales. The Council on Competitiveness found in a survey of 23 critical technologies that software is one of seven technologies in which the United States holds a competitive lead.

In general, the outlook for the U.S. software industry is bright. However, piracy—the unauthorized duplication and sale of computer programs—is a serious threat to that future. Software consists of little more than easily copied computer code. The intangibility of computer code—and the fact that perfect copies of the most sophisticated programs can be made in seconds—makes it an easy target for thieves who desire to duplicate and sell unauthorized copies. Studies indicate that for every authorized copy of a software program in circulation, there is an illegal copy also in circulation. Losses to the personal computer software industry from all illegal copying were estimated to be $1.6 billion in 1989.

Not only is the software industry seriously damaged by piracy, the public is also victimized. The consumer often is paying for a product that he or she believes is legitimate. However, if in fact the consumer has purchased a pirated copy, he or she is ineligible for the critical support and backup services typically offered by the software publisher.

The only defense against piracy is the copyright law. Effective copyright protection is essential to a healthy computer software industry. The value of computer programs depends entirely on the ability of copyright owners to prevent unauthorized duplication and enforce their rights through the copyright law.

Because acts of software piracy are only misdemeanors, prosecutors are disinclined to prosecute these criminal acts. This is similar to the situation that prevailed for the sound recording and motion picture industries before 1982. In that year, Congress recognized the significant economic damage caused by record and motion picture piracy and provided a sliding scale of criminal penalties for persons involved in the unauthorized reproduction or distribution of multiple copies of sound recordings and motion pictures, authorizing sentences of up to 5 years imprisonment for large-scale piracy (Public Law 97-180). Consequently, the FBI and U.S. Attorney Offices actively investigate and prosecute criminal infringement cases in these industries, providing effective deterrence of piracy. Senate bill 893 corrects the imbalance that exists between treatment of software piracy and the piracy of sound recordings and motion pictures by enhancing criminal sanctions for the willful reproduction or distribution of multiple copies of a computer program.

Under the language of this bill, a person who reproduces or distributes at least 50 copies of one or more computer programs during any 180-day period is subject to a penalty of up to 5 years imprisonment and a $250,000 fine. For offenses involving more than 10 but less than 50 copies, the penalty would be up to 2 years imprisonment and a $250,000 fine.

The committee emphasizes that S. 893, like the existing criminal copyright provisions, punishes only willful infringement for purposes of commercial advantage or private gain. *See* 17 U.S.C. 506; 18 U.S.C. 2139. The importance of this is twofold. First, it clarifies that S. 893 is intended to combat commercial piracy by an infringer who makes actual copies of computer programs; it does not encompass situations in which there is a legitimate commercial dispute over whether there was copying. In the latter situation, the infringer does not evince the state of mind necessary to support a criminal prosecution; consequently, only a civil remedy may be sought.

Second, the limitation restricts prosecutions to commercial pirates, those who copy a computer program for commercial advantage or private gain. Persons such as educators who, without authorization, duplicate more than 10 copies of a computer program would not necessarily meet this test if they were making copies for research or student use with no intention of commercial advantage or personal gain. Even though such copying might not meet the test of criminal infringement, it certainly could provide a cause of action for a civil infringement.

The committee believes this legislation is necessary and important to protect our domestic computer software industry. Current law does not have the teeth necessary to provide a deterrent for would-be pirates or to punish those who steal the rights of copyright owners. This bill not only adds the teeth needed, but also is narrowly drawn to limit its application to those who willfully infringe on the rights of others.

IV. Vote of the Committee

On August 1, 1991, with a quorum present, by unanimous consent, the Committee on the Judiciary ordered the bill, S. 893, without amendment, favorably reported.

V. Text of S. 893

[102d Cong., 1st sess.]

A BILL To amend title 18, United States Code, to impose criminal sanctions for violation of software copyright

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 2319(b)(1) of title 18, United States Code, is amended—

(1) in paragraph (B) by striking "or" after the semicolon;

(2) redesignating paragraph (C) as paragraph (D);

(3) by adding after paragraph (B) the following:

"(C) involves the reproduction or distribution, during any 180-day period, of at least 50 copies infringing the copyright in one or more computer programs (including

any tape, disk, or other medium embodying such programs); or";

(4) in new paragraph (D) by striking "or" after "recording,"; and

(5) in new paragraph (D) by adding ", or a computer program", before the semicolon.

(b) Section 2319(b)(2) of title 18, United States Code, is amended—

(1) in paragraph (A) by striking "or" after the semicolon;

(2) in paragraph (B) by striking "and" at the end thereof and inserting "or"; and

(3) by adding after paragraph (B) the following:

"(C) involves the reproduction of distribution, during any 180-day period, of more than 10 but less than 49 copies infringing the copyright in one or more computer programs (including any tape, disk, or other medium embodying such programs); and".

(c) Section 2319(c) of title 18, United States Code, is amended—

(1) in paragraph (1) by striking "and" after the semicolon;

(2) in paragraph (2) by striking the period at the end thereof and inserting "; and"; and

(3) by adding at the end thereof the following:

"(3) the term 'computer program' has the same meaning as set forth in section 101 of title 17, United States Code.".

VI. Section-by-Section

Section (a) amends section 2319(b)(1) of title 18, to penalize, with up to 5 years imprisonment and a $250,000 fine, the reproduction or distribution of 50 or more copies of a computer program during a 180-day period.

Section (b) amends section 2319(b)(2) of title 18, to penalize, with up to 2 years imprisonment and a $250,000 fine, the reproduction or distribution of more than 10 but less than 49 copies of a computer program during a 180-day period. For purposes of this section, "less than 49" should be read as "49 or fewer" copies.

Section (c) adopts the definition of computer program in section 101 of title 17.

VII. Cost Estimate

In accordance with paragraph 11(a), rule XXVI, of the Standing Rules of the Senate, the committee offers the report of the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, October 17, 1991.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 893, a bill to amend title 18, United States Code, to impose criminal sanctions for violation of software copyright, as ordered reported by the Senate Committee on the Judiciary on August 1, 1991.

Currently, violations of computer software copyrights are misdemeanor offenses; S. 893 would make such violations felony offenses. Enactment of this legislation would increase the maximum penalties for violations, which could result in increased revenues from the collection of penalties. However, CBO has no basis for predicting the amount of any increased receipts. Enactment of S. 893 also could result in additional costs to the Department of Justice for enforcement of the criminal sanctions, but any such costs are not likely to be significant.

The only potential budgetary impact that could affect pay-as-you-go scoring under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 would be the possible additional receipts resulting from the increased penalties. However, CBO cannot estimate the amount of any such additional receipts. Therefore, for purposes of pay-as-you-go considerations, CBO estimates that the net effect on receipts of S. 893 in fiscal years 1992 to 1995 would be zero.

No costs would be incurred by state or local governments as a result of enactment of this bill.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mitchell Rosenfeld, who can be reached at 226-2860, and John Stell, who can be reached at 226-2720.

Sincerely,

ROBERT D. REISCHAUER,
Director.

VIII. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have a direct regulatory impact.

IX. CHANGES IN EXISTING LAW

In accordance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 893, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets; new material is printed in italic; existing law in which no change is proposed is shown in roman):

TITLE 18—CRIMES AND CRIMINAL PROCEDURE

CHAPTER 113—STOLEN PROPERTY

§ 2319. Criminal infringement of a copyright

(a) Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsection (b) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law.

(b) Any person who commits an offense under subsection (a) of this section—

(1) shall be fined not more than $250,000 or imprisoned for not more than five years, or both, if the offense—

(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least one thousand phonorecords or copies infringing the copyright in one or more sound recordings;

(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of at least sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works; [or]

(C) involves the reproduction or distribution, during any 180-day period, of at least 50 copies infringing the copyright in one or more computer programs (including any tape, disk, or other medium embodying such programs); or

[(C)] *(D)* is a second or subsequent offense under either of subsection (b)(1) or (b)(2) of this section, where a prior offense involved a sound recording [or] a motion picture or other audiovisual work, *or a computer program;*

(2) shall be fined not more than $250,000 or imprisoned for not more than two years, or both, if the offense—

(A) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than one hundred but less than one thousand phonorecords or copies infringing the copyright in one or more sound recordings; [or]

(B) involves the reproduction or distribution, during any one-hundred-and-eighty-day period, of more than seven but less than sixty-five copies infringing the copyright in one or more motion pictures or other audiovisual works; [and] *or*

(C) involves the reproduction or distribution, during any 180-day period, of more than 10 but less than 49 copies infringing the copyright in one or more computer programs (including any tape, disk, or other medium embodying such programs); and

(3) shall be fined not more than $25,000 or imprisoned for not more than one year, or both, in any other case.

(c) As used in this section—

(1) the terms "sound recording", "motion picture", "audiovisual work", "phonorecord", and "copies" have, respectively, the meanings set forth in section 101 (relating to definitions) of title 17; [and]

(2) the terms "reproduction" and "distribution" refer to the exclusive rights of a copyright owner under clauses (1) and (3) respectively of section 106 (relating to exclusive rights in copyrighted works), as limited by sections 107 through 118, of title 17[.]*; and*

(3) the term "computer program" has the same meaning as set forth in section 101 of title 17, United States Code.

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