



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 2007

The Honorable Richard B. Cheney
President
United States Senate
Washington, D.C. 20510

Dear Mr. President:

We are transmitting herewith a legislative proposal entitled the "Intellectual Property Protection Act of 2007." Because intellectual property is critical to not only our economy but also to the public's health and safety, the Attorney General is strongly committed to the protection of intellectual property rights, the safeguarding of our citizens, and the punishment of those who violate the law. The provisions of the legislative proposal are described below.

**Clarifying the Authority of the United States to Prosecute Criminal
Copyright Offenses Before the Pirated Works Have Been Registered**

Section 411 of title 17 currently provides that, with certain exceptions not applicable here, "[n]o action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made." Section 2 of the Administration's legislative proposal would amend section 411 to clarify that this rule applies only to civil infringement actions and not to criminal prosecutions.

A copyright "subsists from [the work's] creation," 17 U.S.C. § 302(a), even if the work is not registered. Registration is an administrative formality, and although this formality has — and should have — certain consequences in civil cases, it should not in criminal cases. Prosecutors cannot control whether or when a copyrighted work is registered. Because prosecutors work for the public good, they should be able to institute an infringement prosecution even if the copyright has not yet been registered.

**Harmonizing Copyright and Trademark Law
with Respect to Seizing Evidence in Civil Cases**

Section 3 of the Administration's legislative proposal addresses the absence of a provision in copyright law that exists in trademark law under the Lanham Act. The Lanham Act provides that under appropriate circumstances, a court may issue an *ex parte* order for the seizure of not only counterfeit goods and marks and the means of making them, but also of "records

documenting the manufacture, sale, or receipt of things involved in such violation.” 15 U.S.C. 1116(d)(1)(A). The Copyright Act lacks a parallel provision permitting the seizure of records or evidence, although the risk exists in copyright cases as much as in trademark cases that such evidence will be destroyed. Accordingly, subsection 3(a) of the Administration’s legislative proposal would amend 17 U.S.C. § 503(a) to provide for the impoundment in civil copyright cases of “records documenting the manufacture, sale, or receipt of things involved in such violation” under an appropriate protective order.

Criminalizing Attempted Copyright Crimes

Subsection 4(a) of the Administration’s legislative proposal would create a new Federal offense of attempting to commit criminal copyright infringement. Currently, the completed crime is defined in 17 U.S.C. § 506(a). Subsection 4(a) would not change the elements of completed copyright infringement crimes. However, it would criminalize any attempt to commit this offense.

It is a general tenet of the criminal law that those who attempt to commit a crime but do not complete it are as morally culpable as those who succeed in doing so. Therefore, subsection 4(a) would amend 17 U.S.C. §§ 506(a)(1)(A) and (B) to include attempts. A final amendment for the purpose of criminalizing copyright attempts is included in section 9 of the Administration’s legislative proposal, which is discussed below.

Harmonizing and Modernizing Criminal Intellectual Property Forfeiture and Restitution Laws

Current intellectual property forfeiture laws lack uniformity, both in the items subject to civil forfeiture and the procedures for criminal forfeiture. A consistent, uniform set of standards governing the seizure and forfeiture of contraband, facilitating equipment, and proceeds for each variety of intellectual property crime would enhance law enforcement efforts, as well as reduce confusion and reinforce protections for innocent third parties and the public. The Administration’s legislative proposal would amend the forfeiture provisions for copyright and other intellectual property offenses to provide a consistent set of forfeiture options and procedures for intellectual property crimes.

Subsection 4(b) of the Administration’s legislative proposal would amend the forfeiture provisions of 17 U.S.C. § 506(b). It would subject to forfeiture in criminal copyright cases any copies of phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a). It also would subject to forfeiture any property that constituted or was derived from any proceeds obtained directly or indirectly as a result of Federal copyright infringement offenses. Finally, subsection 4(b) would subject to forfeiture any property used or intended to be used in any manner or part to commit or facilitate the commission of a Federal copyright infringement offense, including any plates,

molds, matrices, masters, tapes, film negatives, or other articles by means of which the infringed copies or phonorecords may be reproduced, and any electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies or phonorecords.

Under the Administration's proposal, the procedures for civil forfeiture outlined in chapter 46 of title 18 would apply to seizures or civil forfeitures under section 506. The Administration's legislative proposal also would harmonize the procedures for criminal forfeiture under these provisions to conform with the forfeiture provisions of other statutes. Forfeiture of property covered by this section, as well as any seizure and distribution of the property and any related judicial or administrative proceeding, would 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 (specific to certain drug-related cases). The procedures for forfeiture proceedings referenced at 21 U.S.C. § 853(j) apply to criminal forfeiture proceedings under section 506.

While current 17 U.S.C. § 506(b) allows for civil forfeiture only of property "used in the manufacture of such infringing copies or phonorecords," subsection 4(b) of the Administration's legislative proposal also would authorize forfeiture of "property . . . intended to be used" in the commission of the offense, such as blank media or polycarbonate intended for use in producing counterfeit CDs and DVDs.

Subsection 4(b) of the Administration's legislative proposal expressly provides for restitution as well as forfeiture. When a person is convicted of an offense under section 506 of the Administration's legislative proposal, the court would be required to order the person to pay restitution to the copyright owner and any other victim of the offense.

The Administration's legislative proposal would consolidate sections 506 and 509 of title 17; therefore, subsection 4(c) of the proposal would repeal existing 17 U.S.C. § 509. Under the Administration's proposal, section 506 would provide for both civil and criminal forfeiture of all of the types of property that currently are made civilly forfeitable under section 509, although in some instances, the amended subsection 506(b) refers to such property in broader, more general terms, rather than more specific enumerated lists of items.

These proposed amendments to the forfeiture provisions for copyright offenses are consistent with, and nearly identical to, amendments to the forfeiture provisions for counterfeiting offenses that were enacted last year as part of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181 (enacted March 16, 2006). In order to harmonize the forfeiture and restitution laws provisions for criminal intellectual property offenses generally, other sections of the Administration's legislative proposal also would apply similar amendments to other criminal intellectual property statutes.

Importation and Exportation of Infringing Copies of Copyrighted Works

Section 5 amends 17 U.S.C. § 602 to ensure that the export of infringing copies is treated as an infringement of the distribution right, just as importation of infringing copies is now treated under current law, and to make clear that both import and export of infringing copies is subject to criminal as well as civil penalties. Currently, § 602 only addresses the importation of infringing copies.

Under the Copyright Act, the importation or exportation of infringing copies is, in most cases, an infringement of the copyright owner's distribution right, which grants the owner of a copyrighted work the exclusive right to distribute copies of the work to the public. A question arises in situations involving a shipment from one party to himself across a border whether such an importation would constitute a "distribution to the public" for purposes of copyright law. Under current law, 17 U.S.C. § 602 clarifies that in most cases importing infringing copies into the United States violates the distribution right and is itself an infringement of copyright.

Section 5 expands 17 U.S.C. § 602 to make clear that the export of infringing copies should be treated as an infringing distribution, just as the importation of infringing copies is now treated. Further, section 5 clarifies that both import and export of infringing copies are not only actionable civilly, but also may form the basis for a criminal copyright prosecution in certain cases. At the same time, Section 5 maintains the existing exemptions or safe harbors for importation of certain copies currently provided in 17 U.S.C. § 602, and also provides essentially identical provisions for exports. The bill does not change the rule in current 17 U.S.C. § 602(a) that provides only civil remedies against the importation of noninfringing copies that were acquired outside the country. Nor does it affect the criminal remedies against smuggling pirated works into the United States or a foreign country under sections 545 and 546 of title 18.

Counterfeit and stolen intellectual property should not be permitted to flow into or out of the United States. Given the central role that international distribution plays in intellectual property crimes and the importance of not contributing to intellectual property violations in other countries, the shipping of infringing products across the nation's borders should be expressly prohibited. Further, especially in light of the growing importance of intellectual property exports from the United States, overseas purchasers should have confidence that they are receiving legitimate materials, and copyright owners should not lose export sales to copyright infringers, no matter the country in which they operate.

Adding Forfeiture and Restitution Remedies to the DMCA Criminal Provisions Consistent with Those Remedies Available for Other Intellectual Property Crimes

Section 6 of the Administration's proposal would create new forfeiture, destruction, and restitution provisions for the offenses contained in the Digital Millennium Copyright Act ("DMCA"). This provision has been harmonized with the other forfeiture and restitution provisions contained in the bill, as described in the discussion of subsection 4(b), and is also consistent with the forfeiture, destruction, and restitution provisions for counterfeiting cases that were enacted in 2006 as part of the Stop Counterfeiting in Manufactured Goods Act. Although a violation of the DMCA does not require an underlying infringement of a copyright as an element of the offense, the restitution provision is tailored to provide for restitution to copyright holders in those cases where the offense conduct does involve violation of a copyright owner's rights.

Harmonizing the Economic Espionage Act's Forfeiture and Restitution Remedies

Section 7 of the Administration's proposal would amend 18 U.S.C. § 1834 (forfeiture for violations of the Economic Espionage Act) by creating a new subsection 1834(a) setting forth three categories of property that would be subject to forfeiture to the United States: 1) any property consisting of or incorporating any trade secret that was the subject of a violation of the Economic Espionage Act; 2) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of the Economic Espionage Act; and 3) any property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of the Economic Espionage Act. These changes are designed to harmonize forfeiture law concerning intellectual property offenses and are outlined in more detail in the discussion of subsection 4(b) of the bill, above.

Section 7 of the proposal also would create a new restitution provision for the Economic Espionage Act, providing for restitution to the owner of the trade secret.

Harmonizing the Forfeiture, Restitution, and Trafficking Provisions of 18 U.S.C. § 2318

Section 8 of the proposal would amend 18 U.S.C. § 2318(d) to harmonize the forfeiture provisions applicable to section 2318 offenses with those applicable to other intellectual property offenses, as described with respect to section 4(b) of the Administration's proposal. The restitution provision in proposed new 18 U.S.C. § 2318(d)(4) would add, as an explicit recipient for the award of restitution, the owner of the copyright in the underlying work.

Strengthening the Penalties Against Repeat Criminal Copyright Offenders and Clarifying the Penalties For Attempted Criminal Copyright Offenses

Section 9 of the Administration's proposal would amend the repeat offender provisions of 18 U.S.C. § 2319 (criminal infringement of a copyright) in two respects. First, it would amend

the law governing repeat offenses by changing the statutory offenses that, if repeated, subject the offender to stiffer penalties. There are three major criminal acts contained within the criminal copyright statute. Under current law, the repeat offender penalties apply only if a subsequent copyright infringement charge is identical to the earlier offense. A prior violation of any other of the three subsection 506(a) offenses does not trigger the repeat offender penalties, although each violation was a copyright crime and each was done, by definition, willfully.

Section 9 of the Administration's proposal would redress this disparity by amending 18 U.S.C. § 2319 to impose repeat-offender penalties when the copyright infringer committed any two copyright felonies under 17 U.S.C. § 506(a), regardless of the particular type of offense (including attempt offenses as proposed in Section 6(a) of the Administration's proposal).

Harmonizing the Forfeiture and Restitution Provisions of 18 U.S.C. § 2319A

The changes made in section 10(a) of the Administration's proposal are essentially technical. Former 18 U.S.C. § 2319A(c) would be amended and codified in subsection 18 U.S.C. § 2319A(b)(5). Section 10(b) of the proposal would harmonize the forfeiture and restitution provisions of section 2319A with those applicable to other intellectual property offenses in the same manner as section 4(b), discussed more fully above.

Harmonizing the Forfeiture and Restitution Provisions of 18 U.S.C. § 2319B

Section 11 of the Administration's proposal would amend 18 U.S.C. § 2319B(b) to harmonize the forfeiture provisions of § 2319B with those applicable to other intellectual property offenses as described in the discussion of section 4(b) of the proposal.

Strengthening Penalties for Counterfeiting Offenses that Threaten Public Health and Safety

Some counterfeit goods create serious risks to public health and safety. For example, a counterfeit pharmaceutical may be ineffective or harmful, or a substandard electrical cord bearing a counterfeit UL certification mark may pose a fire hazard. Such threats to health and safety are among the principal factors considered in deciding whether to prosecute intellectual property cases criminally, and the Department's Task Force on Intellectual Property has identified these types of cases as being a prosecution priority. To better reflect the seriousness of IP offenses that pose health and safety dangers and to provide greater deterrence against such crimes, it is appropriate to provide increased penalties for counterfeiters who deal in dangerous products.

Accordingly, section 12(a)(1)-(2) provides enhanced maximum statutory penalties for counterfeiting offenses that endanger public health and safety. The proposal increases the maximum penalties for § 2320 offenses from 10 to 20 years imprisonment where the defendant knowingly or recklessly causes or attempts to cause serious bodily injury, and increases the

maximum penalty to life imprisonment where the defendant knowingly or recklessly causes or attempts to cause death. Both the *mens rea* standard (“knowingly” or “recklessly”) and the level of enhanced penalties are consistent with other existing federal criminal statutes that provide enhanced penalties for offenses resulting in serious injury or death. See, e.g., 18 U.S.C. §§ 1030(c)(5) (computer hacking) and 1365(a) (product tampering).

Harmonizing the Forfeiture Provisions of 18 U.S.C. § 2320

Section 12(a)(3)-(4) proposes a minor amendment to the forfeiture provisions of 18 U.S.C. § 2320 (trafficking in counterfeit goods or services) to provide for civil forfeiture of the proceeds from criminal trademark offenses. As a result of 2006 amendments to § 2320's forfeiture provisions by the Stop Counterfeiting in Manufactured Goods Act, § 2320 now expressly provides authority and procedures for the *criminal* forfeiture of not only counterfeit goods (and labeling components) themselves, but also any property used to commit a trademark counterfeiting offenses, and any proceeds of such crime. Section 2320 also provides authority and procedures for civil forfeiture of counterfeit goods and labels, and of property used in the commission of a counterfeiting offense. However, the amendments to 18 U.S.C. § 2320 did not expressly provide for *civil* forfeiture of the proceeds of trademark counterfeiting offenses.

We believe this omission was inadvertent. Civil forfeiture of proceeds is a powerful tool in deterring counterfeiting crime, and while civil forfeiture of the proceeds may already be available pursuant to a combination of money laundering statutes, expressly including in § 2320 itself the authority and procedures for civil forfeiture of proceeds would correct this omission. Further, it would make clear that law enforcement may use this powerful tool against counterfeiters, improving both efficiency and deterrence.

Authority for Voice Intercepts in Investigations of Criminal Trademark and Copyright Offenses

Section 13 of the Administration's proposal would amend 18 U.S.C. § 2516 by adding two intellectual property crimes to the predicate offenses for which law enforcement officers may intercept wire or oral communications for investigation: 1) 18 U.S.C. § 2319 (criminal infringement of copyright); and 2) 18 U.S.C. § 2320 (trafficking in counterfeit goods or services).

Law enforcement officers should have access to the full range of lawful investigative tools when they investigate intellectual property crimes. Currently, a Federal court may issue an order authorizing the use of a voice intercept (otherwise known as a “wiretap”) in the investigations of a host of Federal crimes; copyright and trademark counterfeiting crimes are not among them. This is unacceptable. Some trademark crimes involve dangerous counterfeit pharmaceuticals, pesticides, or auto parts that have the potential to cause widespread consumer injuries. Moreover, the economic impact of criminal copyright infringement cases has increased rapidly in recent years, and such cases increasingly involve sophisticated and organized criminal

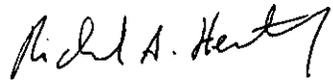
The Honorable Richard B. Cheney

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groups. Accordingly, section 13 provides for voice intercept authority for offenses that are equivalent, if not greater, in impact to other predicate offenses that already give rise to such authority.

Thank you for the opportunity to present this proposal. A more detailed section-by-section analysis is also attached. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Hertling". The signature is fluid and cursive, with a prominent loop at the end.

Richard A. Hertling
Principal Deputy Assistant Attorney General

AN IDENTICAL LETTER IS BEING SENT TO THE SPEAKER OF THE HOUSE.



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 14, 2007

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

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These proposed amendments to the forfeiture provisions for copyright offenses are consistent with, and nearly identical to, amendments to the forfeiture provisions for counterfeiting offenses that were enacted last year as part of the Stop Counterfeiting in Manufactured Goods Act, Pub. L. No. 109-181 (enacted March 16, 2006). In order to harmonize the forfeiture and restitution laws provisions for criminal intellectual property offenses generally, other sections of the Administration's legislative proposal also would apply similar amendments to other criminal intellectual property statutes.

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Section 5 amends 17 U.S.C. § 602 to ensure that the export of infringing copies is treated as an infringement of the distribution right, just as importation of infringing copies is now treated under current law, and to make clear that both import and export of infringing copies is subject to criminal as well as civil penalties. Currently, § 602 only addresses the importation of infringing copies.

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Section 5 expands 17 U.S.C. § 602 to make clear that the export of infringing copies should be treated as an infringing distribution, just as the importation of infringing copies is now treated. Further, section 5 clarifies that both import and export of infringing copies are not only actionable civilly, but also may form the basis for a criminal copyright prosecution in certain cases. At the same time, Section 5 maintains the existing exemptions or safe harbors for importation of certain copies currently provided in 17 U.S.C. § 602, and also provides essentially identical provisions for exports. The bill does not change the rule in current 17 U.S.C. § 602(a) that provides only civil remedies against the importation of noninfringing copies that were acquired outside the country. Nor does it affect the criminal remedies against smuggling pirated works into the United States or a foreign country under sections 545 and 546 of title 18.

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Adding Forfeiture and Restitution Remedies to the DMCA Criminal Provisions Consistent with Those Remedies Available for Other Intellectual Property Crimes

Section 6 of the Administration's proposal would create new forfeiture, destruction, and restitution provisions for the offenses contained in the Digital Millennium Copyright Act ("DMCA"). This provision has been harmonized with the other forfeiture and restitution provisions contained in the bill, as described in the discussion of subsection 4(b), and is also consistent with the forfeiture, destruction, and restitution provisions for counterfeiting cases that were enacted in 2006 as part of the Stop Counterfeiting in Manufactured Goods Act. Although a violation of the DMCA does not require an underlying infringement of a copyright as an element of the offense, the restitution provision is tailored to provide for restitution to copyright holders in those cases where the offense conduct does involve violation of a copyright owner's rights.

Harmonizing the Economic Espionage Act's Forfeiture and Restitution Remedies

Section 7 of the Administration's proposal would amend 18 U.S.C. § 1834 (forfeiture for violations of the Economic Espionage Act) by creating a new subsection 1834(a) setting forth three categories of property that would be subject to forfeiture to the United States: 1) any property consisting of or incorporating any trade secret that was the subject of a violation of the Economic Espionage Act; 2) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of the Economic Espionage Act; and 3) any property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of the Economic Espionage Act. These changes are designed to harmonize forfeiture law concerning intellectual property offenses and are outlined in more detail in the discussion of subsection 4(b) of the bill, above.

Section 7 of the proposal also would create a new restitution provision for the Economic Espionage Act, providing for restitution to the owner of the trade secret.

Harmonizing the Forfeiture, Restitution, and Trafficking Provisions of 18 U.S.C. § 2318

Section 8 of the proposal would amend 18 U.S.C. § 2318(d) to harmonize the forfeiture provisions applicable to section 2318 offenses with those applicable to other intellectual property offenses, as described with respect to section 4(b) of the Administration's proposal. The restitution provision in proposed new 18 U.S.C. § 2318(d)(4) would add, as an explicit recipient for the award of restitution, the owner of the copyright in the underlying work.

Strengthening the Penalties Against Repeat Criminal Copyright Offenders and Clarifying the Penalties For Attempted Criminal Copyright Offenses

Section 9 of the Administration's proposal would amend the repeat offender provisions of 18 U.S.C. § 2319 (criminal infringement of a copyright) in two respects. First, it would amend

the law governing repeat offenses by changing the statutory offenses that, if repeated, subject the offender to stiffer penalties. There are three major criminal acts contained within the criminal copyright statute. Under current law, the repeat offender penalties apply only if a subsequent copyright infringement charge is identical to the earlier offense. A prior violation of any other of the three subsection 506(a) offenses does not trigger the repeat offender penalties, although each violation was a copyright crime and each was done, by definition, willfully.

Section 9 of the Administration's proposal would redress this disparity by amending 18 U.S.C. § 2319 to impose repeat-offender penalties when the copyright infringer committed any two copyright felonies under 17 U.S.C. § 506(a), regardless of the particular type of offense (including attempt offenses as proposed in Section 6(a) of the Administration's proposal).

Harmonizing the Forfeiture and Restitution Provisions of 18 U.S.C. § 2319A

The changes made in section 10(a) of the Administration's proposal are essentially technical. Former 18 U.S.C. § 2319A(c) would be amended and codified in subsection 18 U.S.C. § 2319A(b)(5). Section 10(b) of the proposal would harmonize the forfeiture and restitution provisions of section 2319A with those applicable to other intellectual property offenses in the same manner as section 4(b), discussed more fully above.

Harmonizing the Forfeiture and Restitution Provisions of 18 U.S.C. § 2319B

Section 11 of the Administration's proposal would amend 18 U.S.C. § 2319B(b) to harmonize the forfeiture provisions of § 2319B with those applicable to other intellectual property offenses as described in the discussion of section 4(b) of the proposal.

Strengthening Penalties for Counterfeiting Offenses that Threaten Public Health and Safety

Some counterfeit goods create serious risks to public health and safety. For example, a counterfeit pharmaceutical may be ineffective or harmful, or a substandard electrical cord bearing a counterfeit UL certification mark may pose a fire hazard. Such threats to health and safety are among the principal factors considered in deciding whether to prosecute intellectual property cases criminally, and the Department's Task Force on Intellectual Property has identified these types of cases as being a prosecution priority. To better reflect the seriousness of IP offenses that pose health and safety dangers and to provide greater deterrence against such crimes, it is appropriate to provide increased penalties for counterfeiters who deal in dangerous products.

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maximum penalty to life imprisonment where the defendant knowingly or recklessly causes or attempts to cause death. Both the *mens rea* standard (“knowingly” or “recklessly”) and the level of enhanced penalties are consistent with other existing federal criminal statutes that provide enhanced penalties for offenses resulting in serious injury or death. See, e.g., 18 U.S.C. §§ 1030(c)(5) (computer hacking) and 1365(a) (product tampering).

Harmonizing the Forfeiture Provisions of 18 U.S.C. § 2320

Section 12(a)(3)-(4) proposes a minor amendment to the forfeiture provisions of 18 U.S.C. § 2320 (trafficking in counterfeit goods or services) to provide for civil forfeiture of the proceeds from criminal trademark offenses. As a result of 2006 amendments to § 2320's forfeiture provisions by the Stop Counterfeiting in Manufactured Goods Act, § 2320 now expressly provides authority and procedures for the *criminal* forfeiture of not only counterfeit goods (and labeling components) themselves, but also any property used to commit a trademark counterfeiting offenses, and any proceeds of such crime. Section 2320 also provides authority and procedures for civil forfeiture of counterfeit goods and labels, and of property used in the commission of a counterfeiting offense. However, the amendments to 18 U.S.C. § 2320 did not expressly provide for *civil* forfeiture of the proceeds of trademark counterfeiting offenses.

We believe this omission was inadvertent. Civil forfeiture of proceeds is a powerful tool in deterring counterfeiting crime, and while civil forfeiture of the proceeds may already be available pursuant to a combination of money laundering statutes, expressly including in § 2320 itself the authority and procedures for civil forfeiture of proceeds would correct this omission. Further, it would make clear that law enforcement may use this powerful tool against counterfeiters, improving both efficiency and deterrence.

Authority for Voice Intercepts in Investigations of Criminal Trademark and Copyright Offenses

Section 13 of the Administration's proposal would amend 18 U.S.C. § 2516 by adding two intellectual property crimes to the predicate offenses for which law enforcement officers may intercept wire or oral communications for investigation: 1) 18 U.S.C. § 2319 (criminal infringement of copyright); and 2) 18 U.S.C. § 2320 (trafficking in counterfeit goods or services).

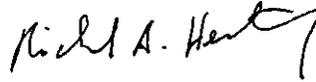
Law enforcement officers should have access to the full range of lawful investigative tools when they investigate intellectual property crimes. Currently, a Federal court may issue an order authorizing the use of a voice intercept (otherwise known as a “wiretap”) in the investigations of a host of Federal crimes; copyright and trademark counterfeiting crimes are not among them. This is unacceptable. Some trademark crimes involve dangerous counterfeit pharmaceuticals, pesticides, or auto parts that have the potential to cause widespread consumer injuries. Moreover, the economic impact of criminal copyright infringement cases has increased rapidly in recent years, and such cases increasingly involve sophisticated and organized criminal

The Honorable Nancy Pelosi
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groups. Accordingly, section 13 provides for voice intercept authority for offenses that are equivalent, if not greater, in impact to other predicate offenses that already give rise to such authority.

Thank you for the opportunity to present this proposal. A more detailed section-by-section analysis is also attached. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that, from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Hertling". The signature is fluid and cursive, with a prominent loop at the end.

Richard A. Hertling
Principal Deputy Assistant Attorney General

AN IDENTICAL LETTER IS BEING SENT TO THE PRESIDENT OF THE SENATE.

H.R. _____

Intellectual Property Protection Act

110th Congress

1st Session

H.R. _____

To strengthen the protection of intellectual property, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

_____, 2007

M _____ introduced the following bill, which was referred to the Committee on the Judiciary.

A BILL

To strengthen the protection of intellectual property, and for other purposes.

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

SECTION 1. SHORT TITLE

(a) SHORT TITLE- This Act may be cited as the "Intellectual Property Protection Act of 2007."

SECTION 2. REGISTRATION IN CIVIL INFRINGEMENT ACTIONS.

(a) AMENDMENT- Section 411 of title 17, United States Code, is amended—

(1) in the section heading, by inserting "civil" before "infringement";

(2) in subsection (a), by inserting "civil" before "action" the second time it appears; and

(3) in subsection (b), by striking "506 and sections 509 and" and inserting "505 and section".

SECTION 3. CIVIL REMEDIES FOR INFRINGEMENT.

(a) AMENDMENT- Section 503 of title 17, United States Code, is amended—

(1) in subsection (a), by striking the final period and inserting “and records documenting the manufacture, sale, or receipt of things involved in such violation. The court shall enter an appropriate protective order with respect to discovery by the applicant of any records that have been seized. The protective order shall provide for appropriate procedures to assure that confidential information contained in such records is not improperly disclosed to the applicant.”

SECTION 4. CRIMINAL INFRINGEMENT

(a) IN GENERAL- Section 506(a)(1) of title 17, United States Code, is amended—

(1) by inserting “or attempts to infringe” before “a copyright” and

(2) by striking the comma and “if the infringement was committed” after “18”;

(3) by striking subparagraph (A) and inserting “(A) if the infringement was committed or attempted for purposes of commercial advantage or private financial gain”;

(4) in subparagraph (B), by striking “by the reproduction or distribution” and inserting “if the infringement was committed or attempted by the reproduction or distribution”; and

(6) by inserting at the beginning of subparagraph (C) “if the infringement was committed”.

(b) FURTHER AMENDMENT- Section 506(b) of title 17, United States Code, is amended by striking that subsection and inserting the following:

“(b) Forfeiture and destruction; restitution.—

“(1) The following property is subject to forfeiture to the United States—

“(A) any copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a);

“(B) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of subsection (a); and

“(C) any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of a violation of subsection (a), including any plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which the copies or phonorecords described in subparagraph (A) may be reproduced, and any electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies or phonorecords.

“(2) The provisions of chapter 46 of title 18 relating to civil forfeitures shall extend to any seizure or civil forfeiture under this section. At the conclusion of the forfeiture proceedings, the court shall order that any forfeited infringing copies or phonorecords, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such unauthorized copies or phonorecords may be made, be destroyed or otherwise disposed of according to law.

“(3)(A) The court, in imposing sentence on a person convicted of an offense under this section, shall order, in addition to any other sentence imposed, that the person forfeit to the United States-

“(i) any infringing copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a);

“(ii) any property constituting or derived from any proceeds obtained, directly or indirectly, as the result of the offense; and

“(iii) any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of a violation of subsection (a), including any plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which the copies or phonorecords described in subparagraph (A) may be reproduced, and any electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies or phonorecords.

“(B) The forfeiture of property under subparagraph (A), 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. At the conclusion of the forfeiture proceedings, the court shall order that any forfeited infringing copies or phonorecords, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such infringing copies or phonorecords may be made, be destroyed or otherwise disposed of according to law.

“(4) When a person is convicted of an offense under this section, the court, pursuant to sections 3556, 3663A, and 3664 of Title 18, United States Code, shall order the

person to pay restitution to the copyright owner and any other victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii).”

(c) SEIZURE AND FORFEITURE- Section 509 of title 17, United States Code, is repealed.

SECTION 5. IMPORTATION AND EXPORTATION

(a) IN GENERAL- Chapter 6 of Title 17, United States Code, is amended to read “Manufacturing Requirements, Importation, and Exportation”

(b) AMENDMENT- Section 602(a) of Title 17, United States Code, is amended–

(1) By striking “(1)” and inserting “(A)”;

(2) By striking “(2)” and inserting “(B)”;

(3) By striking “(3)” and inserting “(C)”;

(4) By inserting before “Importation” “(1)”;

(5) By striking, “This subsection does not apply to–”;

(6) By inserting before subparagraph (A) the following:

“(2) Importation into the United States or exportation from the United States, without the authority of the owner of copyright under this title, of copies or phonorecords, the making of which either constituted an infringement of copyright or would have constituted an infringement of copyright if this title had been applicable, is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under sections 501 and 506.

“(3) Exceptions.–This subsection does not apply to–”

(7) By inserting “or exportation” before the first “of” in clause (A);

(8) By inserting in clause (B) “or exportation” before the first comma;

(9) By inserting in clause (B) “or exporter” before “and”;

(10) By inserting in clause (B) “or departing from the United States” before the second “with”;

(c) FURTHER AMENDMENT- Section 602 of Title 17, United States Code, is amended in the section heading by inserting “or exportation” before “of copies or phonorecords”.

SECTION 6. DIGITAL MILLENNIUM COPYRIGHT ACT

(a) IN GENERAL- Section 1204 of title 17, United States Code, is amended by inserting at the end the following:

“(d) Forfeiture and destruction; restitution.--

“(1) The following property is subject to forfeiture to the United States–

“(A) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of subsection (a); and

“(B) any property used or intended to be used in any manner or part to commit or facilitate the commission of a violation of subsection (a).

“(2) The provisions of chapter 46 of title 18 relating to civil forfeitures shall extend to any seizure or civil forfeiture under this section. At the conclusion of the forfeiture proceedings, the court shall order that any property forfeited pursuant to paragraph (1)(B) be destroyed or otherwise disposed of according to law.

“(3)(A) The court, in imposing sentence on a person convicted of an offense under this section, shall order, in addition to any other sentence imposed, that the person forfeit to the United States–

“(i) any property constituting or derived from any proceeds obtained, directly or indirectly, as the result of the offense; and

“(ii) any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of the offense.

“(B) The forfeiture of property under subparagraph (A), 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. At the conclusion of the forfeiture proceedings, the court shall order that any implement, device, or equipment used in any manner or part to commit or facilitate the commission of a violation of subsection (a), be destroyed or otherwise disposed of according to law.”

“(4) When a person is convicted of an offense under this section, the court, pursuant to sections 3556, 3663A, and 3664 of Title 18, United States Code, shall order the person to pay restitution to any copyright owner whose rights under this title were violated by the offense, as an offense against property referred to in section 3663A(c)(1)(A)(ii).”

SECTION 7. FORFEITURE UNDER ECONOMIC ESPIONAGE ACT

(a) IN GENERAL- Section 1834 of title 18, United States Code, is amended–

(1) by striking “(a)” and inserting “(c)”;

(2) by striking “(b)” and inserting “(d)”;

(3) in paragraph (d) as amended, by striking “this section” and inserting “paragraph (c)”; and

(4) by inserting at the beginning the following:

“(a) The following property is subject to forfeiture to the United States:

“(1) any property that consists of or incorporates any trade secret that is the subject of a violation of this chapter;

“(2) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of this chapter; and

“(3) any property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of this chapter.

“(b) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under paragraph (a).”; and

(5) by inserting at the end the following:

“(e) When a person is convicted of an offense under this section, the court, pursuant to sections 3556, 3663A, and 3664, shall order the person to pay restitution to the owner of the trade secret and any other victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii).”

SECTION 8. TRAFFICKING IN COUNTERFEIT LABELS

(a) IN GENERAL- Section 2318 of title 18, United States Code, is amended-

(1) by making subsection (d) read as follows:

“(d)Forfeiture and destruction; restitution.

“(1) The following property is subject to forfeiture to the United States-

“(A) any counterfeit documentation or packaging, and any counterfeit label or illicit label and any article to which a counterfeit label or illicit label has been affixed, or which a counterfeit label or illicit label encloses or accompanies, or which was intended to have had such label affixed, enclosing, or accompanying;

“(B) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of subsection (a); and

“(C) any property used, or intended to be used, in any manner or part to commit or facilitate the commission of a violation of subsection (a).

“(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under paragraph (1). At the conclusion of the forfeiture proceedings, the court shall order that any forfeited counterfeit labels or illicit labels and any article to which a counterfeit label or illicit label has been affixed, or which a counterfeit label or illicit label encloses or accompanies, or which was intended to have had such label affixed, enclosing, or accompanying, be destroyed or otherwise disposed of according to law.

“(3)(A) The court, in imposing sentence on a person convicted of an offense under this section, shall order, in addition to any other sentence imposed, that the person forfeit to the United States-

“(i) any counterfeit documentation or packaging, and any counterfeit label or illicit label and any article to which a counterfeit label or illicit label has been affixed, or which a counterfeit label or illicit label encloses or accompanies, or which was intended to have had such label affixed, enclosing, or accompanying;

“(ii) any property constituting or derived from any proceeds obtained, directly or indirectly, as the result of the offense; and

“(iii) any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of the offense.

“(B) The forfeiture of property under subparagraph (A), 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. At the conclusion of the forfeiture proceedings, the court shall order that any counterfeit label or illicit label and any article to which a counterfeit label or illicit label has been affixed, or which a counterfeit label or illicit label encloses or accompanies, or which was intended to have had such label affixed, enclosing, or accompanying, be destroyed or otherwise disposed of according to law.

(4) When a person is convicted of an offense under this section, the court, pursuant to sections 3556, 3663A, and 3664, shall order the person to pay restitution to the owner of the marks or copyrighted works involved in the offense and any other victim of the offense as an offense against property referred to in section 3663(A)(c)(1)(A)(ii).”.

SECTION 9. CRIMINAL INFRINGEMENT OF A COPYRIGHT

(a) IN GENERAL- Section 2319 of title 18, United States Code, is amended as follows–

(1) in subparagraph (b)(1), by inserting “or was intended to consist of” before “reproduction”;

(2) in subparagraph (b)(2), by inserting “felony” before “offense” and by striking “1” and inserting “a”;

(3) in subparagraph (c)(1), by inserting “or was intended to consist of” before “reproduction”;

(4) in subparagraph (c)(2), by inserting “felony” before “offense” and by striking “1” and inserting “a”;

(5) in subparagraph (d)(3), by inserting “felony” before “offense” and inserting “under paragraph (a)” before the semi-colon; and

(6) in subparagraph (d)(4), by inserting “felony” before “offense”.

SECTION 10 . UNAUTHORIZED FIXATION AND TRAFFICKING

(a) IN GENERAL. Section 2319A of title 18, United States Code, is amended—

- (1) by striking subsection (c);
- (2) in subsection (d), by striking “(d)” and inserting “(c)”;
- (3) in subsection (e), by striking “(e)” and inserting “(d)”;
- (4) in subsection (f), by striking “(f)” and inserting “(e)”.

(b) FORFEITURE AND DESTRUCTION. Section 2319A(b) of title 18, United States Code, is amended to read as follows:

“(b) Forfeiture and destruction; restitution.--

“(1) The following property is subject to forfeiture to the United States—

“(A) any unauthorized copies or phonorecords of a live musical performance, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such copies or phonorecords may be made;

“(B) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of subsection (a); and

“(C) any property used or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of subsection (a);

“(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under paragraph (1). At the conclusion of the forfeiture proceedings, the court shall order that any forfeited unauthorized copies or phonorecords of live musical performances, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such unauthorized copies or phonorecords may be made, be destroyed or otherwise disposed of according to law.

“(3)(A) The court, in imposing sentence on a person convicted of an offense under this section, shall order, in addition to any other sentence imposed, that the person forfeit to the United States—

“(i) all unauthorized copies or phonorecords of live musical performances, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such unauthorized copies or phonorecords may be made;

“(ii); any property constituting or derived from any proceeds obtained, directly or indirectly, as the result of the offense; and

“(iii) any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of the offense.

“(B) The forfeiture of property under subparagraph (A), 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. At the conclusion of the forfeiture proceedings, the court shall order that any forfeited unauthorized copies or phonorecords of live musical performances, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such unauthorized copies of phonorecords may be made, be destroyed or otherwise disposed of according to law.

“(4) Notification of importation.— The Secretary of Homeland Security shall issue regulations by which any performer may, upon payment of a specified fee, be entitled to notification by United States Customs and Border Protection of the importation of copies or phonorecords that appear to consist of unauthorized fixations of the sounds or sounds and images of a live musical performance.

“(5) When a person is convicted of an offense under this chapter, the court, pursuant to sections 3556, 3663A, and 3664, shall order the person to pay restitution to the performer or performers, and any other victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii).”

(c) APPLICABILITY. At the end of section 2319A(e), as renumbered, insert before the period the following:

“, except that the criminal forfeiture provisions in subparagraph (b)(3) shall apply only where the underlying act or acts occur on or after the effective date of that subparagraph”.

SECTION 11. UNAUTHORIZED RECORDING OF MOTION PICTURES

(a) IN GENERAL. Section 2319B(b) of title 18, United States Code, is amended to read as follows:

“(b) Forfeiture and destruction; restitution.--

“(1) The following property is subject to forfeiture to the United States—

“(A) any unauthorized copies of a motion picture or other audiovisual work protected under title 17, or part thereof;

“(B) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of subsection (a); and

“(C) any property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of subsection (a).

“(2) The provisions of chapter 46 of this title relating to civil forfeitures shall extend to any seizure or civil forfeiture under this section. At the conclusion of the forfeiture proceedings, the court shall order that any forfeited unauthorized copies or phonorecords of a motion picture or other audiovisual work, or part thereof, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such unauthorized copies or phonorecords may be made, be destroyed or otherwise disposed of according to law.

“(3)(A) The court, in imposing sentence on a person convicted of an offense under this section, shall order, in addition to any other sentence imposed, that the person forfeit to the United States—

“(i) any unauthorized copies of motion pictures or other audiovisual works protected under title 17, or parts thereof;

“(ii) any property constituting or derived from any proceeds obtained, directly or indirectly, as a result of the offense; and

“(iii) any property used, or intended to be used, in any manner or part, to commit or facilitate the commission of the offense.

“(B) The forfeiture of property under subparagraph (A), 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. At the conclusion of the forfeiture proceedings, the court shall order that any forfeited unauthorized copies or phonorecords of a motion picture or other audiovisual work, or part thereof, as well as any plates, molds, matrices, masters, tapes, and film negatives by means of which such unauthorized copies or phonorecords may be made, be destroyed or otherwise disposed of according to law.

“(4) When a person is convicted of an offense under this chapter, the court, pursuant to sections 3556, 3663A, and 3664, shall order the person to pay restitution to the owner of the copyright in the motion picture or other audiovisual work and any other victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii).”

SECTION 12. TRAFFICKING IN COUNTERFEIT GOODS OR SERVICES

(a) IN GENERAL- Section 2320 of title 18, United States Code, is amended—

(1) in subsection (a), by inserting before “Whoever” the following:

“Offense –
(1) In general –”.

(2) by adding at the end of subsection (a) the following:

“(2) SERIOUS BODILY HARM OR DEATH.—
(A) If the offender knowingly or recklessly causes or attempts to cause serious bodily injury from conduct in violation of paragraph (1), the penalty shall be a fine under this title or imprisonment for not more than 20 years, or both.
(B) If the offender knowingly or recklessly causes or attempts to cause death from conduct in violation of paragraph (1), the penalty shall be a fine under this title or imprisonment for any term of years or for life, or both.”.

(3) in subsection (b)(1), by inserting after subsection (b)(1)(A) the following:

“(B) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of subsection (a); and”

(4) in subsection (b)(1)(B), by striking “(B)” and inserting “(C)”;

SECTION 13. INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS

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

(1) 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 2320 (relating to trafficking in counterfeit goods or services),”.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 provides that the short title of the legislation is the Intellectual Property Protection Act of 2007.

Section 2

Section 2 amends 17 U.S.C. § 411 to make clear that registration of a copyright with the Copyright Office is not a prerequisite to a criminal prosecution for copyright infringement.. Currently, § 411 provides that, with certain exceptions not applicable here, “[n]o action for infringement of the copyright in any United States work shall be instituted until registration of the copyright claim has been made.” To clarify that this rule applies only to civil infringement actions and not to criminal prosecutions, section 2 amends § 411 to explicitly limit the registration prerequisite to civil actions.

A copyrightable work’s copyright “subsists from [the work’s] creation.” 17 U.S.C. § 302(a). The copyright exists, even if the work is not registered. Registration is largely a formality, albeit a formality with significant procedural consequences. See 17 U.S.C. §§ 410(a)-(b) (requiring Register of Copyrights to determine whether work is copyrightable before registering the work), 410(c) (making a certificate of registration in most cases prima facie evidence that the work’s copyright is valid), 411 (conditioning certain suits upon registration), 412 (conditioning certain remedies upon registration). Although this formality has — and should have — certain consequences in civil cases, in criminal cases it should not. Prosecutors do not control whether or when a copyrighted work is registered. Because prosecutors work for the public good, they should be able to institute an infringement prosecution even if the copyright has not yet been registered. This is especially true now that a typical criminal prosecution for copyright piracy over the Internet commonly involves hundreds, if not thousands, of copyrighted works. The burden of checking whether each work was registered would substantially slow down investigations and hinder the government’s ability to prosecute these violations, especially infringement of works owned by small businesses that have not had the time or resources to register.

Because this provision is a clarification, it works no change on existing practice of how and when prosecutors prove the existence of a copyright in an infringement case, and does not affect any pending cases. However, as certificates of registration generally provide the most expedient means of proving the existence, validity, and ownership of a copyright (see, e.g., 17 U.S.C. § 410(c)), the Department of Justice will continue to advise federal prosecutors that the recommended course in most cases is to prosecute with a copyright registration in hand, both as a matter of public policy and as matter of practicality at trial.

Section 3

Section 3(a) amends 17 U.S.C. § 503 to allow for *ex parte* seizure of documentary evidence in civil copyright cases, similar to authority already provided for in civil trademark counterfeiting cases under the Lanham Act. The Lanham Act provides that under appropriate circumstances, a court may issue an *ex parte* order for the seizure of not only counterfeit goods and marks and the means of making them, but also of “records documenting the manufacture, sale, or receipt of things involved in such violation.” 15 U.S.C. § 1116(d)(1)(A). However, the Copyright Act does not contain a parallel provision permitting the seizure of records or evidence in civil cases, even though the risk exists in copyright cases as much as in trademark cases that such evidence will be destroyed.

Many potential infringers of trademarks and copyrights are unscrupulous operators who know full well that their actions are illegal. If they become aware that legal action is being taken against them, many will disappear or hide or destroy their infringing goods and the evidence of their infringement.

Accordingly, Congress recognized the need in certain circumstances for right holders to be able to institute legal actions *ex parte*. 15 U.S.C. § 1116(d) trademark actions; Fed. R. Civ. P. 65(f) (copyright actions). The legislative history of the Lanham Act’s *ex parte* provision explains that its purpose is to provide victims of trademark counterfeiting a means of ensuring court jurisdiction in counterfeiting cases to thwart the practice of destroying or transferring counterfeit merchandise when court action approaches, while ensuring ample procedural protections for persons against whom such orders are issued. 130 Cong. Rec. H12076 (Oct. 10, 1984). Although copyright owners may institute *ex parte* actions under Fed. R. Civ. P. 65(f), the Copyright Act does not specifically provide for the seizure of evidence as the Lanham Act does for trademark actions. However, some copyright pirates are just as likely to destroy evidence as trademark counterfeiters, and in fact, it is not uncommon for copyright pirates to also be engaged in trademark counterfeiting. Therefore, Section 3(a) amends the Copyright Act to put its *ex parte* seizure provisions for civil cases on equal footing with those of the Lanham Act.

Section 4

Section 4(a) creates a new federal offense of attempting to infringe a copyright. The completed crime is currently defined in 17 U.S.C. § 506(a). Section 4(a) makes no change to the elements of the offense of copyright infringement. It does, however, criminalize attempts to commit this offense.

Section 4(a) is needed because, as with other criminal intellectual property laws, such as the criminal counterfeit goods and services statute, 18 U.S.C. § 2320, an attempt to violate the criminal copyright statute should be counted an offense whether it is successful or not. It is a general tenet of the criminal law that those who attempt to commit a crime but do not complete it are as morally culpable as those who succeed in doing so.

Although two federal criminal laws generally punish the aiding-and-abetting or conspiracy to violate any federal crime (see 18 U.S.C. §§ 2 and 371), no general law does the

same for attempts. Consequently, the problem must be fixed by specifically amending the criminal copyright statutes. Section 4(a) therefore amends 17 U.S.C. §§ 506(a)(1)(A) and (B) to include attempts. Section 506(a)(1)(C) is not amended because that clause includes a number of elements that would make an attempt difficult to prove or investigate.

A final amendment for the purpose of criminalizing copyright attempts is included in section 13, which is discussed below. It amends 18 U.S.C. § 2319, which sets forth the penalty for violations of 17 U.S.C. §§ 506(a)(1)(A) and (B), to clarify that the penalties that apply when the offense “consists of” reproduction or distribution, also apply when reproduction or distribution is intended but not completed.

Section 4(b) amends the forfeiture provisions of 17 U.S.C. § 506(b) to expressly provide for both civil and criminal forfeiture of not only infringing items, but also the proceeds of copyright offenses and the equipment used or intended to be used to commit them. Section 4(b) also amends § 506(b) to expressly provide for restitution in copyright cases. These amendments essentially parallel amendments made last year to the forfeiture and restitution provisions of 18 U.S.C. § 2320 (trademark counterfeiting) pursuant to the Stop Counterfeiting in Manufactured Goods Act (Pub. L. 109-181, enacted Mar. 16, 2006).

Large-scale piracy of copyrighted works relies on the use of various materials and tools to produce and distribute such works. Although it is important that law enforcement officials be able to seize counterfeit items and pirated works themselves, effective anti-piracy efforts can be significantly enhanced by allowing for the seizure and forfeiture of illicit proceeds and the materials and tools being used to engage in large-scale piracy. Therefore, Section 4(b) subjects to forfeiture any copies of phonorecords manufactured, reproduced, distributed, sold or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a). It also subjects to forfeiture any property that constitutes or is derived from any proceeds obtained directly or indirectly as a result of federal copyright infringement offenses. Finally, it subjects to forfeiture any property used or intended to be used in any manner or part to commit or facilitate the commission of a federal copyright infringement offense, including any plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which the infringed copies or phonorecords may be reproduced, and any electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies or phonorecords.

In conjunction with changes to forfeiture provisions for trademark counterfeiting offenses enacted in 2006, as well as amendments elsewhere in the bill, the amendments in Section 4(b) will create a more consistent structure and uniform set of procedures for forfeiture in intellectual property cases. Current forfeiture laws in the intellectual property area vary widely. Although many types of property involved in intellectual property offenses are subject to forfeiture under current law, in many situations the availability of forfeiture is not set forth in the offense statute itself, and the actual process of forfeiture, even where available, involves reliance on a complex web of money laundering and other statutory provisions. All the criminal intellectual property provisions in U.S. law are designed to serve the common goals of fostering and protecting creativity, innovation, the integrity of commercial transactions and markets, and public health and safety. A consistent, uniform set of standards governing the seizure and forfeiture of contraband, facilitating equipment, and proceeds for each variety of intellectual property crime

will enhance law enforcement efforts, as well as reduce confusion and reinforce protections for innocent third parties and the public.

The amendments in section 4(b) help to harmonize not only the classes of property subject to forfeiture in intellectual property cases, but the procedures for forfeiture as well. For example, with regard to civil forfeiture, section 4(b) makes clear that the procedures for civil forfeiture outlined in chapter 46 of title 18, including those designed to protect innocent third-party owners of affected property, apply to seizures or civil forfeitures under section 506. At the conclusion of the forfeiture proceeding, the court is required to issue an order to destroy or otherwise dispose of any forfeited infringing copies or phonorecords, as well as any property used to commit (in any manner or part) or facilitate commission of the offense, including any plates, molds, matrices, masters, tapes, and film negatives by means of which unauthorized copies or phonorecords may be made.

Likewise, the procedures for criminal forfeiture under this section have also been harmonized to conform with the recently-amended forfeiture provisions of 18 U.S.C. § 2320 (trademark counterfeiting) as well as those of other statutes outside the IP area. Forfeiture of property covered by this section, as well as any seizure and distribution of the property and any related judicial or administrative proceeding, is to 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 (specific to certain drug-related cases). The procedures for forfeiture proceedings referenced at 21 U.S.C. § 853(j) therefore apply to criminal forfeiture proceedings under this section.

Although the current section 506(b) allows for civil forfeiture only of property “used in the manufacture of such infringing copies or phonorecords,” Section 4(b) also allows for forfeiture of “property . . . intended to be used” in the commission of the offense. For example, where law enforcement officials raided a facility engaged in production of counterfeit CDs and DVDs, this change allows civil forfeiture of not only counterfeit discs that had already been produced, and the equipment used to produce them, but also such items as blank media or polycarbonate intended for use in producing additional discs. This change also makes the enumerated types of property subject to civil forfeiture consistent with those subject to criminal forfeiture, as well as consistent with civil forfeiture provisions elsewhere in Federal law.

Section 4(b) provides for restitution as well as forfeiture. When a person is convicted of an offense under section 506, the court, pursuant to sections 3556, 3663A, and 3664 of title 18, United States Code, shall order the person to pay restitution to the copyright owner and any other victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii). Section 4(b) adds “restitution” to the captions in the subsection that governs restitution as well as forfeiture and destruction to better reflect that restitution is a concept separate from forfeiture.

Sections 506 and 509 have been consolidated, and therefore, Section 4(c) repeals existing section 509. As rewritten, section 506 now provides for both civil and criminal forfeiture of all of the types of property that are currently made civilly forfeitable under section 509, although in some instances, the amended section 506(b) refers to such property in broader, more general terms, rather than more specific enumerated lists of items. For example, while existing § 509

provides for the forfeiture of certain types of property “intended for use, or possessed with intent to use in violation of subsection 506(a),” section 506(b) as amended covers all of these same types of property, and others as well, by referring to “any property used, or intended for use [in committing the offense].”

Section 5

Section 5 amends 17 U.S.C. § 602 to ensure that the export of infringing copies is treated as an infringement of the distribution right subject to criminal as well as civil penalties, and to clarify how the importation and exportation of copyrighted goods affect the distribution right and related criminal remedies. Currently, § 602 only addresses the importation of infringing copies.

Under the Copyright Act, among a copyright owner’s exclusive rights with respect to a work is the right to distribute the work “to the public” by various means. 17 U.S.C. § 106(3). Violation of this exclusive right is copyright infringement, for which civil remedies and criminal penalties may be available. In many situations, the importation or exportation of infringing works constitutes an infringing distribution because the transaction involves the importation or exportation from one party to the public. But when the importation or exportation is not done “to the public,” as when the transaction involves shipment from one party to itself across the border, the distribution right might not be implicated. Section 4 therefore clarifies that both the importation or exportation of pirated copyrighted works is subject to both the civil and criminal remedies in sections 501 and 506 of title 17.

Where the current § 602 allows certain exemptions or safe harbors for importation of works, section 5 provides essentially identical provisions for exports. The bill does not change the rule in current 17 U.S.C. § 602(a) that provides only civil remedies against the importation of noninfringing copyrighted works that were acquired outside the country. Nor does it affect the criminal remedies against smuggling pirated works into the United States or a foreign country under sections 545 and 546 of title 18.

Counterfeit and stolen intellectual property should not be permitted to flow into or out of the United States. Given the central role that international distribution plays in intellectual property crimes and the importance of not contributing in any way to intellectual property violations in other countries, the shipping of infringing products across the nation’s borders should be expressly prohibited. Further, because intellectual property is the largest category of exported materials from the United States, overseas purchasers should have confidence that they are receiving legitimate materials, and copyright owners should not lose export sales to copyright infringers, no matter the country in which they operate.

Section 6

Section 6 creates new forfeiture, destruction, and restitution provisions for the offenses contained in the Digital Millennium Copyright Act (18 U.S.C. § 1201 *et seq.*). This provision has been harmonized with the other forfeiture and restitution provisions contained in the bill, as described in section 4(b). Although a violation of the Digital Millennium Copyright Act does not require an underlying infringement of a copyright as an element of the offense, the restitution

provision is tailored to provide for restitution to copyright holders in those cases where the offense conduct does involve violation of a copyright owner's rights.

Section 7

Section 7 amends section 18 U.S.C. § 1834, the forfeiture provision for violations of the Economic Espionage Act. These amendments are designed to harmonize the forfeiture provisions for intellectual property offenses, and are consistent with those proposed in Section 4(b) for copyright offenses, as well as those enacted for trademark offenses in 18 U.S.C. § 2320 last year.

Section 7 creates a new section 1834(a) that sets forth three categories of property that are subject to forfeiture to the United States: (1) any property that consists of or incorporates any trade secret that is the subject of a violation of the Economic Espionage Act; (2) any property constituting or derived from any proceeds obtained directly or indirectly as a result of a violation of the Economic Espionage Act; and (3) any property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of a violation of the Economic Espionage Act. These changes are outlined in detail in the discussion of section 4(b) of the bill. As with the proposed amendments designed to harmonize other intellectual property forfeiture provisions, the new section 1834(b) makes applicable to any seizure or civil forfeiture arising under new section 1834(a) the procedural provisions of chapter 46, relating to civil forfeiture.

Section 7 also creates a new restitution provision for the Economic Espionage Act, providing for restitution to the owner of the trade secret underlying the offense.

Section 8

Section 8 amends 18 U.S.C. § 2318(d) to harmonize the forfeiture provisions applicable to § 2318 offenses with those applicable to other intellectual property offenses, as described more fully in the analysis of Section 4(b). Section 8 also improves the restitution provision in § 2318(d)(4) by adding to the list of those victims eligible for restitution, the owner of the copyright in the underlying work, such as the copyright owner of the work to which a counterfeit or illicit label was affixed or designed to be affixed.

Section 9

Section 9 amends the repeat-offender provisions of 18 U.S.C. §2319 (criminal infringement of a copyright) in two respects. First, it amends the law governing repeat offenses by changing the statutory offenses that, if repeated, subject the offender to stiffer penalties. Currently, there are three major criminal acts contained within the criminal copyright statute: infringement for commercial advantage or private financial gain, 17 U.S.C. § 506(a)(1)(A); infringement for non-commercial purposes above a certain threshold, 17 U.S.C. § 506(a)(1)(B); and infringement of pre-release works over a publicly-accessible computer network, 17 U.S.C. § 506(a)(1)(C). Under current law, if an offender commits, for example, infringement for commercial advantage or private financial gain (§ 506(a)(1)(A)) and then commits another offense for commercial advantage or private financial gain (§ 506(a)(1)(A)), he is subject to

more stringent penalties for the second offense. On the other hand, an offender who, for example, commits infringement for commercial advantage or private financial gain (§ 506(a)(1)(A)) and then commits the offense of copyright infringement for non-commercial purposes above a certain threshold (§ 506(a)(1)(B)) under current law would elude the penalties for repeat offenders. In other words, under current law, the repeat-offender penalties apply only if the subsequent copyright infringement offense is identical to the earlier offense. A later conviction for any other § 506(a) offense does not trigger the repeat penalties, even though it is a copyright crime and was done, by definition, willfully.

Section 9 redresses this disparity by amending § 2319 to impose repeat-offender penalties when the copyright infringer commits any two copyright felonies under 17 U.S.C. § 506(a), regardless of the particular type of offense. This will treat all repeat felony copyright infringers similarly, regardless of the form that their crimes took. It is accomplished by replacing the references to the specific copyright infringement offenses in current subsections (b)(2), (c)(2), and (d)(3) with the general copyright offense set forth in subsection (a), *i.e.*, any felony violation of § 506(a).

The second change made in Section 9 criminalizes attempts to commit the underlying offenses. For the reasons set forth in describing Section 4(a), attempts to commit copyright infringement offenses should be punishable just like the completed crime. Section 9 accomplishes this goal by amending section 2319 to clarify that the penalties that apply when the offense “consists of” reproduction or distribution also apply when reproduction or distribution were intended but not completed.

Section 10

The changes made in section 10(a) are largely technical. The relevant portions of former subsection (c), addressing seizure and forfeiture, are now amended and codified in § 2319A(b).

Section 10(b) harmonizes the forfeiture provisions of section 2319A with those applicable to other intellectual property offenses in the same manner as Section 4(b).

Section 11

Section 11 amends 18 U.S.C. §2319B(b) to harmonize its forfeiture provisions with those applicable to other intellectual property offenses as described more fully in Section 4(b).

Section 12

Section 12 contains two sets of amendments to 18 U.S.C. § 2320 (trafficking counterfeit marks in connection with goods and services): a minor change to its forfeiture provisions, and a more substantial change to increase the maximum penalties for offenses causing serious bodily harm or death.

Subsections 12(a)(1)-(2) amend 18 U.S.C. § 2320 to harmonize the forfeiture provisions under that section with those in other intellectual property offenses described above. As a result of the enactment of the Protecting American Goods and Services Act of 2006 (part of the Stop

Counterfeiting in Manufactured Goods Act, Pub. L. 109-181, enacted Mar. 16, 2006), the forfeiture provisions of § 2320 are largely consistent with those proposed above in Section 4(b). However, the drafters of the PAGS/SCMGA did not expressly provide for civil forfeiture of the proceeds of § 2320 offenses. Sections 12(a)(1)-(2) correct that omission.

Section 12(b) provides enhanced maximum statutory penalties for counterfeiting offenses that endanger public health and safety. Section 12(b) increases the maximum penalties for § 2320 offenses from 10 years imprisonment to 20 years where the defendant knowingly or recklessly causes or attempts to cause serious bodily injury, and increases the maximum penalty to life imprisonment where the defendant knowingly or recklessly causes or attempts to cause death. Both the *mens rea* standard (“knowingly” or “recklessly”) and the level of enhanced penalties (up to 20 years for offenses resulting in serious injury; up to life imprisonment for offenses resulting in death) are consistent with other existing federal criminal statutes that provide enhanced penalties for offenses resulting in serious injury or death. *See, e.g.*, 18 U.S.C. §§1030(c)(5) (computer hacking) and 1365(a) (product tampering).

Some counterfeit goods create serious risks to public health and safety— for example, a counterfeit pharmaceutical may be ineffective or harmful, or a substandard electrical cord bearing a counterfeit UL certification mark may pose a fire hazard. Such threats to health and safety are among the principal factors considered in deciding whether to prosecute intellectual property cases criminally, and the Department’s Intellectual Property Task Force has identified these types of cases as being of particular concern to the Department. To better reflect the seriousness of IP offenses that pose health and safety dangers and to provide greater deterrence against such crimes, it is appropriate to provide increased penalties for counterfeiters who deal in dangerous products.

Section 13

Section 13 amends 18 U.S.C. § 2516 by adding two intellectual property crimes to the predicate offenses for which law enforcement officers may obtain a wire or oral communication for investigation: 18 U.S.C. § 2319, criminal infringement of copyright, and 18 U.S.C. § 2320, trafficking in counterfeit goods or services.

Law enforcement officers should have access to the full range of accepted law enforcement tools when they investigate intellectual property crimes. A federal court may issue an order authorizing the use of a voice intercept, otherwise known as a “wiretap,” in the investigation of many federal crimes, but not for copyright and trademark counterfeiting crimes. This is unacceptable. Some trademark crimes involve dangerous counterfeits: counterfeit pharmaceuticals, pesticides, or auto parts that have the potential to cause widespread consumer injuries. Moreover, the economic impact of criminal copyright infringement cases has increased rapidly in recent years, and such cases increasingly involve sophisticated and organized criminal groups. Accordingly, section 13 provides for voice intercept authority for offenses that are equivalent, if not greater, in impact to other predicate offenses that already give rise to such authority.