

US bill allows copyright owners to target P2P networks

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1 Introduction

The United States Congress is presently considering the *P2P Piracy Prevention Act* (HR 5211), which if passed, will provide copyright owners with protection from civil and criminal liability for actions taken to block unauthorised distribution of their works through peer-to-peer (P2P) networks, subject to certain limitations.

On 25 July 2002, Howard Berman, Democrat representative for the state of California, introduced the bill-form of the *P2P Piracy Prevention Act* (Bill) into the United States House of Representatives. If passed, the Bill will amend Title 17 of the United States Code, inserting section 514 which contains a copyright owner's 'self-help' regime.

After introduction, the Bill was referred to the House Committee on the Judiciary and then, on 20 August 2002, to the Subcommittee on Courts, the Internet and Intellectual Property.

2 Legal provisions

The Bill establishes a self-help regime for copyright owners, providing a legal 'safe harbour' from which they can take measures (called "**Impairing Activities**") against file traders to undermine the infringement of their copyright by those file traders. The protections afforded to copyright owners are subject to quite stringent limitations, along with a notification requirement. The Bill also establishes a cause of action for wrongful impairment and allows the Justice Department to prevent Impairing Activities.

2.1 Protection from liability for Impairing Activity

The Bill exempts a copyright owner (or their authorised agent)¹ from criminal and civil liability for undertaking any Impairing Activity to prevent the infringement of their copyright² where this infringement is

occurring via a publicly available P2P file trading network. The actions which copyright owners may take are stated by the Bill to be "disabling, interfering with, blocking, diverting, or otherwise impairing" infringing activities. The infringement to which the copyright owner may react is not limited to file sharing or copying, but extends to "unauthorised distribution, display, performance or reproduction."

2.2 Limitations on scope of Impairing Activity

The Bill establishes legal confines within which copyright owners must act if they wish to enjoy immunity from liability. To satisfy the Bill's requirements, copyright owners, when undertaking any Impairment Activity:

- must **not**, without authorisation, "alter, delete, or otherwise impair the integrity" of any file or data on a file trader's computer;
- must **not** impair the availability of files or data on the P2P network that do not contain a work, or a portion of a work, to which they own copyright, except as may be "reasonably necessary" to prevent the infringement of their own copyright;
- must **not** cause any economic loss to any person other than affected file traders; and
- must **not** cause affected file traders more than \$50 in economic loss per impairment action, excluding the value of data and files made available over the P2P network that contain works to which the particular copyright owner enjoys copyright.

2.3 Notification requirement

To be protected by the Bill, at least seven days before the Impairment Activity is undertaken by the copyright owner, the copyright owner must notify the Department of Justice of the specific type of technology that

will be used in their Impairment Activity.

Furthermore, if the affected file trader (or the assignee of their IP address) requests, the copyright owner must provide them with a notice stating the reason for the undertaking of the Impairing Activity, the copyright owner's name and address, and the file trader's right to bring an action for Wrongful Impairment.

2.4 Wrongful Impairment

The Bill also establishes an action for "Wrongful Impairment". This action is only applicable if the copyright owner's Impairing Activities would be unlawful but for the Bill's provisions.

If a copyright owner:

- knowingly and intentionally undertakes Impairment Activity as prescribed by the Bill;
- does so without a reasonable basis to believe that the activities of the file trader constitutes an infringement of copyright; and
- the file trader suffers economic loss in excess of \$250,

then the affected file trader may, within one year, file a claim for compensation with the Attorney General.

If the Attorney General determines that the claim has substance, the file trader may launch court action to recover their economic loss.

2.5 Injunctive relief

Under the Bill, the US Attorney General is given the right to seek injunctions to prevent copyright owners from engaging in Impairment Activity, regardless of whether they satisfy the substantive requirements of the Bill. This action is available where the particular copyright owner has engaged in "a pattern or practice" of undertaking Impairment Activities without a reasonable basis for believing that an infringement of their copyright has occurred.

3 Issues raised by the Bill

Clearly, the Bill offers a number of advantages for copyright owners over the present system for policing intellectual property rights. Many entertainment companies, let alone individual artists, do not have the funds to pursue litigation (the only real avenue at present for enforcing their rights) against every individual engaging in infringing action over P2P networks. Any attempt to police copyright over P2P networks using the present legal framework would require the cooperation (probably legislatively mandated) of internet providers, who could face massive costs associated with tracking their online traffic and identifying (where technically possible) data containing copyright works. The Bill would help avoid such compliance costs, circumventing time consuming and expensive legal processes, allowing copyright owners to stifle piracy using the same cheap, accessible technology used to infringe their rights.

However, notwithstanding these allures, a number of contentious issues are raised by the measures proposed by the Bill, both legal and commercial.

There are questions about the appropriateness of allowing copyright owners to effectively take the law into their own hands and engage in disruptive activities to protect their copyright. It is arguable that the Bill establishes an undesirable precedent by allowing citizens to interfere, without judicial oversight or approval, in the activities (albeit unlawful) of others. While proponents might argue that the common law recognises self-help, for example, by allowing a property owner to trespass on another's land to recover their unlawfully taken chattels, intellectual property, by virtue of its intangibility,

is a different creature. Patent and trademark owners do not have the right to enter an infringer's property of their own volition and take possession of items they deem to be infringing.

There is also the possibility of abuse or over-enthusiastic use of Impairing Activities by copyright owners. While the Bill's limitations confine the scope of Impairing Activities to non-destructive disruption of the copyright infringement process that does not curtail access to non-copyright files beyond what is "reasonably necessary", there is still the possibility that Impairing Activity may prove detrimental in the wider sense. Even where what is "reasonably necessary" is quite restrictively interpreted, depending on the technology adopted, wide-scale or simultaneous Impairing Activity could significantly disturb the online activity of law-abiding file-traders, let alone the non-infringing activity of file traders engaged in copyright infringement.

There are also some oversights, since while the Bill requires the Justice Department to be notified of the type of technology to be used in Impairing Activity, the copyright owner's *modus operandi* is left to their discretion. Given the novel powers the Bill effectively confers on copyright owners, it is arguable that the legislature should define the types of techniques able to be used. At the very least, the Government should have the power to seek an injunction to prevent the use of methods it perceives not to be in the public interest or undesirable on policy grounds, notwithstanding that the Bill's requirements are otherwise met.

Finally, there is the issue of technological and commercial impact. As has been seen, for example with regard to 'chipping' of region coded DVD players or patching of software,

when measures are introduced to protect intellectual property rights, counter-measures usually follow rapidly. If this were to be the case, the result could be the deployment of large suites of impairing software to do battle online (and consume bandwidth) with defensive software, along with Impairing Activity inviting retaliatory strikes from file traders with sufficient technical skill. This would clearly be undesirable. Furthermore, P2P networks have in many ways been the "killer app" driving demand for broadband Internet access and innovation, as few other uses require the bandwidth. While piracy is inherently wrong, the effect of removing broadband's major *raison d'etre* must be considered and balanced against the gains to be made from stamping out P2P piracy. This is especially the case when we consider the anecdotal evidence that P2P pirates also tend to be the largest purchasers of recorded music and recall the panic that the introduction of cassettes and VCRs caused in the entertainment industry only to have these technologies become significant sources of income for their main detractors.

The Bill offers an attractive alternative to the present method for enforcing copyright. However, it requires reasoned consideration, and probably some amendment, to address the issues it raises and possible detriment it may cause.

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- 1 'Copyright owner' is defined as the legal or beneficial owner of an exclusive right under section 106 of the United States Code or any party authorised to act on the owner's behalf.
 - 2 The Bill extends to the following infringing activities: "an authorised distribution, display, performance or reproduction" of a copyright work.