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The State of Copyright

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LEGAL ISSUES

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The State of Copyright

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In keeping with beginning of the year reviews and housekeeping chores, this issue of *ATG* is an appropriate forum for an examination of the legislation proposed and/or passed by the **United States Congress** in 1997 and early 1998. Our legislators were busy and, with new issues on intellectual property greeting us ever more frequently, we can only expect both the Congress and the Courts to become inundated with more questions and proposed laws. The legislative advisory committees within our professional associations will likely be just as busy and we are grateful to those people who not only monitor the proposed legislation, but alert their membership on a regular basis to both the good and bad laws coming out of Washington.

Below are summaries of some of the most important proposed and new laws that made their way through Congress in 1997. A separate discussion of S. 1146, H.R. 3048 and H.R. 2652, three bills of the utmost importance to library communities, can be found in the accompanying sidebar. You can follow legislative activity regarding these and other bills by accessing thomas.loc.gov, the congressional website.

H.R.72 – A bill to amend title 17, United States Code, to allow the making of a copy of a computer program in connection with the maintenance or repair of a computer. SPONSOR: Rep Knollenberg (introduced 01/07/97). STATUS: Jan 7, 97: Referred to the House Committee on the Judiciary. Jan 28, 97: Referred to the Subcommittee on Courts and Intellectual Property.

H.R.604 – A bill to amend title 17, United States Code, with respect to the duration of copyright, and for other purposes. SPONSOR: Rep Gallegly (introduced 02/05/97). STATUS: Feb 5, 97: Referred to the House Committee on the Judiciary. Mar 5, 97: Referred to the Subcommittee on Courts and Intellectual Property.

Copyright Term Extension Act, HR 604, by Rep. Elton Gallegly, R-California, together with S 505, by Sen. Hatch, seek to extend the duration of copyright from the author's life plus 50 years to life plus 70 years, to allow heirs of deceased authors an additional 20 years of copyright protection if the work is not yet in the public domain, and to provide copyright protection to certain works already in the public domain.

H.R.672 Public Law: 105-80 (11/13/97) – A bill to make technical amendments to certain provisions of title 17, United States Code. SPONSOR: Rep Coble (introduced 02/11/97). SUMMARY: Amends the Satellite Home Viewer Act of 1994 and various Federal copyright provisions to make technical and conforming amendments with respect to: (1) licensing and royalty fees charged for the retransmission for home viewing of superstation and network station transmissions; (2) the copyrighting of restored works; (3) licenses for nonexempt subscription transmissions; (4) royalties payable under compulsory licenses; (5) negotiated licenses for jukeboxes; (6) copyright registration and infringement actions; and (7) digital audio recording devices and media.

(Sec. 7) Authorizes the **Register of Copyrights**, after conducting a study, to increase the copyright fees to be paid to the Copyright Office for 1997 and thereafter to cover Office costs for the registration of claims, the recording of documents, and the provision of services. Requires the Register, for any such increase, to prepare a proposed fee schedule and

submit such schedule and an economic analysis to the Congress. Requires a 120-day waiting period after submission of such schedule and analysis before its implementation.

(Sec. 8) Authorizes the **Librarian of Congress**, upon the recommendation of the **Register of Copyrights**, to: (1) authorize the distribution of those royalty fees collected that the Librarian has found to be not subject to controversy; and (2) accept or reject royalty claims on the basis of timeliness or the failure to establish the basis for a claim. Directs the Librarian to reimburse the arbitrators presiding in royalty distribution proceedings, considering such costs to be reasonable costs incurred by the Library and the Office. Requires the reasonable costs incurred by the Librarian and the Office in ratemaking proceedings to be borne by the parties to the proceedings as directed by the arbitration panels.

H.R.695 Security and Freedom Through Encryption (SAFE) Act – A bill to amend title 18, United States Code, to affirm the rights of U.S. persons to use and sell encryption and to relax export controls on encryption. SPONSOR: Rep Goodlatte (introduced 02/12/97). STATUS: Sep. 29, 97: Placed on the Union Calendar, Calendar No. 160.

H.R.789 – A bill to amend title 17, United States Code, with respect to certain exemptions from copyright, and for other purposes. SPONSOR: Rep Sensenbrenner (introduced 02/13/97). STATUS: Feb 13, 97: Referred to the House Committee on the Judiciary. Mar 5, 97: Referred to the Subcommittee on Courts and Intellectual Property.

H.R.1621 – A bill to amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes. SPONSOR: Rep Bono (introduced 05/15/97). RELATED BILLS: S.505 STATUS: May 15, 97: Referred to the House Committee on the Judiciary. May 29, 97: Referred to the Subcommittee on Courts and Intellectual Property.

H.R.2180 – A bill to amend title 17, United States Code, to provide limitations on copyright liability relating to material online, and for other purposes. 2180 is the online service provider liability bill. SPONSOR: Rep Coble (introduced 07/17/97). STATUS: Jul 17, 97: Referred to the House Committee on the Judiciary. Jul 21, 97: Referred to the Subcommittee on Courts and Intellectual Property. Sep 16, 97: Subcommittee Hearings Held.

H.R. 2265 Public Law: 105-147 (12/16/97) –

A bill to amend the provisions of titles 17 and 18, United States Code, to provide greater copyright protection by amending criminal copyright infringement provisions, and for other purposes. SPONSOR: Rep Goodlatte (introduced 07/25/97). SUMMARY: No Electronic Theft (NET) Act – Amends Federal copyright law to define "financial gain" to include the receipt of anything of value, including the receipt of other copyrighted works.

Sets penalties for willfully infringing a copyright: (1) for purposes of commercial advantage or private financial gain; or (2) by reproducing or distributing, including by electronic means, during any 180-day period, one or more copies of one or more copyrighted works with a total retail value of more than \$1,000. Provides that evidence of reproduction or

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distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement.

Extends the statute of limitations for criminal copyright infringement from three to five years.

Revises Federal criminal code provisions regarding criminal copyright infringement to provide for a fine and up to five years' imprisonment for infringing a copyright for purposes of commercial advantage or private financial gain, by reproducing or distributing, including by electronic means, during any 180-day period, at least ten copies or phonorecords of one or more copyrighted works which have a total retail value of more than \$2,500.

Provides for: (1) up to three years' imprisonment and fines in infringement cases described above (exclusive of commercial gain intent considerations); (2) up to six years' imprisonment and a fine for a second or subsequent felony offense under (1); and (3) up to one year's imprisonment and a fine for the reproduction or distribution of one or more copies or phonorecords of one or more copyrighted works with a total retail value of more than \$1,000.

Requires, during preparation of the presentence report in cases of criminal copyright infringement, unauthorized fixation and trafficking of live musical performances, and trafficking in counterfeit goods or services, that victims of the offense be permitted to submit, and the probation officer receive, a victim impact statement that identifies the victim and the extent and scope of the victim's injury and loss, including the estimated economic impact of the offense on that victim.

Directs the U.S. Sentencing Commission to ensure that the applicable guideline range for a defendant convicted of a crime against intellectual property is sufficiently stringent to deter such a crime and adequately reflects consideration of the retail value and quantity of items with respect to which the crime against intellectual property was committed.

H.R.2281—A bill to amend title 17, United States Code, to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty. WIPO Implementation along with S. 1121. SPONSOR: Rep Coble (introduced 07/29/97). STATUS: Jul 29, 97: Referred to the House Committee on the Judiciary. Aug 7, 97: Referred to the Subcommittee on Courts and Intellectual Property. Sep 16, 97: Subcommittee Hearings Held.

H.R.2589—A bill to amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes. SPONSOR: Rep Coble (introduced 10/01/97). STATUS: Oct 1, 97: Referred to the House Committee on the Judiciary.

H.R.2652—A bill to amend title 17, United States Code, to prevent the misappropriation of collections of information. SPONSOR: Rep Coble (introduced 10/09/97). STATUS: Oct 9,

97: Referred to the House Committee on the Judiciary. Oct 17, 97: Referred to the Subcommittee on Courts and Intellectual Property. Oct 23, 97: Subcommittee Hearings Held. SUMMARY: Collections of Information Antipiracy Act — Amends Federal copyright law to make persons who extract, or use in commerce, a substantial part of a collection of information gathered or maintained by another person through the investment of substantial resources, so as to harm the other person's actual or potential market for a product or service that incorporates such information and is offered in commerce liable to the person for remedies under this Act.

Exempts certain activities from this Act, including the extraction or use of individual items of information or extraction or use of information for verification, not-for-profit educational, scientific, or research, or news reporting purposes.

Provides that protection shall not extend to government collections of information or computer programs (except for collections incorporated in such programs).

Requires all rights specified in this Act to be governed exclusively by Federal law, thus preempting State law.

Authorizes civil actions to be brought for violations of this Act. Provides for injunctions to prevent violations and authorizes impoundment of all copies of information extracted or used in violation. Entitles plaintiffs to specified monetary relief. Makes provisions regarding injunctions and impoundment inapplicable to actions against the U.S. Government. Provides for relief against State entities.

Prescribes criminal penalties for certain willful violations. Provides for a three-year statute of limitations on civil and criminal actions.

H.R.3048—A bill to update and preserve balance in the Copyright Act for the 21st Century; to advance educational opportunities through distance learning; to implement the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and for other purposes. SPONSOR: Rep Boucher (introduced 11/13/97). STATUS: Nov 13, 97: Referred to the House Committee on the Judiciary. Nov 24, 97: Referred to the Subcommittee on Courts and Intellectual Property. SUMMARY: Digital Era Copyright Enhancement Act — Expands the fair use of a copyrighted work to include uses by analog or digital transmission in connection with teaching, research, and other specified activities.

Expands certain rights of libraries and archives to reproduce and distribute copies or phonorecords to authorize three copies or phonorecords (currently, one) to be reproduced or distributed for preservation, security, or replacement purposes.

Revises certain limitations on exclusive rights to provide that the following are not infringements: (1) performances, displays, or distributions of copyrighted works by or in the course of analog or digital transmissions in connection with certain distance education activities; and (2) copying works in digital format if such copying is incidental to the operation of a

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SIDEBAR

S. 1146 is the **Digital Copyright Clarification and Technology Act** introduced by Sen. John Ashcroft (R-MO), bill H.R. 3048, the **Digital Era Copyright Enhancement Act**, introduced by Reps. Rick Boucher (D-VA) and Tom Campbell (R-CA). The presidents of ALA, AALL, ARL and SLA have released a joint letter requesting members of all four associations to contact their Senators and Representatives and urge them to co-sponsor these two very important digital copyright bills.

According to the organizations' leadership, following the release of the White Paper in 1995 the Administration has sought, through both domestic and international negotiations, to amend the Copyright Act to bring it into the electronic age. After years of opposing many of these initiatives, the library community now has the opportunity to support and actively promote two digital copyright bills that preserve the balance between copyright owners and users in the digital age.

In an **Action Alert** released to its membership, the **American Association of Law Libraries** described these bills as being of critical importance to libraries. According to the AALL Washington Affairs Office, "they include provisions for fair use, preservation, ephemeral copying and distance education that are critical to libraries in the networked environment. **H.R. 3048** contains two strong provisions that are not in the Senate bill: one covers the digital equivalent of the First Sale doctrine; the other is a preemption provision that would negate the use of state contract law to override federal copyright law, such as the proposed revision to the UCC." It is the view of the leadership that "taken together, these bills provide the best means of updating the Copyright Act while at the same time, preserving the balance between copyright owners and users in the electronic age." Analyses of both bills, what they do and why libraries should support them, can be found on the **Digital Future Coalition's** home page at <http://www.dfc.org>.

H.R. 2652, the "Collections of Information Antipiracy Act" was introduced by Rep. Howard Coble, Chair of the House Subcommittee on Courts and Intellectual Property, in October, 1997, and followed by a hearing on October 23rd. Another hearing was held on February 12, 1998. The purpose of this legislation is to provide database makers that are no longer protected by copyright under the "sweat of the brow" doctrine with protection so they can be compensated for their investments and efforts in creating and maintaining databases.

This is a highly controversial bill which would nullify the U.S. Supreme Court's 1991 decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, which stated that originality must be involved to obtain copyright. The bill would provide copyright protection to database owners with very limited fair use provisions and severe penalties for infringers.

According to **Brian Negin**, H.R. 2652 "is a renewed attempt to give commercial database producers statutory protection that was limited after the U.S. Supreme Court decision in *Feist* (1991). The new bill proposes a misappropriation approach to the protection 'collections of information' (the word database does not appear), without establishing a new property right in databases. The bill is the response to the tremendous criticism aimed at the *suis generis* property regime in databases proposed previously in the US, proposed and removed from the agenda at the WIPO meetings last December, but adopted by the European Union." To fully understand the thrust of **HR 2652**, please refer to the testimonial documentation given to the House Judiciary on Oct. 23, 1997 and February 12, 1998. <<http://www.house.gov/judiciary/4.htm>>

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device in the course of the otherwise lawful use of a work, does not conflict with the normal exploitation of the work, and does not unreasonably prejudice the author's interests.

Provides that when a work is distributed to the public subject to non-negotiable license terms, such terms shall not be enforceable under the common law or statutes of any State to the extent that they: (1) limit the reproduction, adaptation, distribution, performance, or display of uncopyrightable material; or (2) abrogate or restrict specified limitations on exclusive rights.

Prohibits, for purposes of infringement, the knowing removal, deactivation, or circumvention of technological measures used by a copyright owner to preclude or limit reproduction of a work.

Bars the provision or distribution of false copyright management information with the intent to induce or conceal infringement. Defines "copyright management information" as certain information, including title, name of author and copyright owner, and terms for use of the work, in electronic form as carried in or as data accompanying a copy or a phonorecord of a work.

Prohibits the removal or alteration of such information or the distribution of copies or phonorecords so altered with the intent to induce infringement.

Establishes civil remedies with respect to violations of technological measure or copyright management information provisions.

See S. 1146 for further information regarding these two very important bills.

S.28—A bill to amend title 17, United States Code, with respect to certain exemptions from copyright, and for other purposes. SPONSOR: Sen Thurmond (introduced 01/21/97). STATUS: Jan 21, 97: Read twice and referred to the Committee on Judiciary.

S.421—A bill to amend title 35, United States Code, to establish the Patent and Trademark Office as a Government corporation, and for other purposes. SPONSOR: Sen Lautenberg (introduced 03/11/97). STATUS: Mar 11, 97: Read twice and referred to the Committee on Judiciary.

S.505—A bill to amend the provisions of title 17, United States Code, with respect to the duration of copyright, and for other purposes. SPONSOR: Sen Hatch (introduced 03/20/97). RELATED BILLS: H.R.1621. STATUS: Mar 20, 97: Read twice and referred to the Committee on Judiciary.

S.506—A bill to clarify certain copyright provisions, and for other purposes. SPONSOR: Sen Hatch (introduced 03/20/97). STATUS: Mar 20, 97: Read twice and referred to the Committee on Judiciary. Apr 17, 97: Committee on Judiciary. Ordered to be reported without amendment favorably. Apr 17, 97: Committee on Judiciary. Reported to Senate by Senator Hatch without amendment. Without written report. Placed on Senate Legislative Calendar under General Orders. Calendar No.40.

S.1044—A bill to amend the provisions of titles 17 and 18, United States Code, to provide greater copyright protection by amending criminal copyright infringement provisions, and for other purposes. SPONSOR: Sen Leahy (introduced 07/21/97). STATUS: Jul 21, 97: Read twice and referred to the Committee on Judiciary.

S.1121—A bill to amend Title 17 to implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Sponsor: Sen Hatch (by req.) . WIPO Implementation along with H.R. 2281. SPONSOR: Sen Hatch (by req.) (introduced 07/31/97). STATUS: Jul 31, 97: Read twice and referred to the Committee on Judiciary.

S.1146—A bill to amend title 17, United States code, to provide limitations on copyright liability relating to material online, and for other purposes. SPONSOR: Sen Ashcroft (introduced 09/03/97). STATUS: Sep 3, 97: Read twice and referred to the Committee on Judiciary. Sep 4, 97: Committee on Judiciary. Hearings held.

S.1426—SPONSOR: Sen Lautenberg (introduced 11/07/97). SHORT TITLE(S) AS INTRODUCED: Rights of Intellectual Property Owners Fairness Facilitation Act of 1997. OFFICIAL TITLE AS INTRODUCED: A bill to encourage beneficiary developing countries to provide adequate protection of intellectual property rights, and for other purposes. STATUS: Nov 7, 97: Read twice and referred to the Committee on Finance.

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