that we have not determined," Commerce press officer Maria Cardona told me. I called Mack himself, but he said he could not reply. "When you're as low on the totem pole as I am . . ." he said, trailing off.

However, an unsigned Commerce document of Dec. 9, 1996, supplied to Solomon earlier this year, quotes Mack as saying that "he personally briefed Huang and had him sign a SF-312" in July 1994 but adds: "Mack has no recall of the debriefing" the following January. The memorandum continues that "he does recall" a call from a high-ranking official "to make sure that Huang did not lose his top-secret clearance" but kept it as a "consultant."

"Mack said to the best of his knowledge, Huang never worked as a consultant, but DISCO [Defense Industrial Security Clearance Office] did issue a top-secret clearance to Huang. . . . DISCO has never been notified to cancel the clearance," the memo continued. The memo writer said the clearance, issued on Dec. 14, 1995, was still valid on Dec. 9, 1996.

Yet another mysterious document: Commerce security officer Richard Duncan—Mack's colleague—on Feb. 13, 1995, wrote an internal memo listing Huang among other officials as signing SF-312s. Was this an attempt to create a paper trail?

This is the curious conclusion of John Huang's access to secret information. It began with the official request Jan. 31, 1994 that the required background investigation for Huang be waived because of "the critical need for his expertise . . . by Secretary [Ron] Brown." When Huang resigned a year later, Assistant Secretary Charles Meissner proposed the consultant's role, in order for Huang to retain access to classified documents. Brown and Meissner both perished in the tragic plane crash in Croatia, but their patronage of John Huang remains a fit subject for scrutiny.

THE ON-LINE COPYRIGHT LIABILITY LIMITATION ACT

HON. HOWARD COBLE

OF NORTH CAROLINA

IN THE HOUSE OF REPRESENTATIVES

Thursday, July 17, 1997

Mr. COBLE. Mr. Speaker, the On-Line Copyright Liability Limitation Act is being introduced in response to concerns raised by a number of on-line service and Internet access providers regarding their potential liability for copyright infringement when infringing material is transmitted on-line through their services. While several judicially created doctrines currently address the question of when liability is appropriate, providers have sought greater certainty through legislation as to how these doctrines will apply in the digital environment. Undoubtedly, service providers will be concerned that the exemption contained in this bill does not go far enough and copyright owners will be concerned that it goes too far. This bill is meant to be a new starting point for discussion among the groups affected by its provisions.

BOB GOODLATTE of Virginia invested months of his time in the last Congress leading negotiation sessions between on-line service and Internet access providers, telephone companies, libraries, universities, and copyright owners. He will continue to steer the negotiation process in this Congress as the parties involved begin discussions starting from the framework established in the On-Line Copyright Liability Limitation Act.

GENERAL APPROACH

The general approach of the bill is to be as simple and streamlined as possible. It provides a single exemption, written broadly so as to cover a range of acts dealt with in separate exemptions in drafts under discussion last year. The availability of the exemption depends on the actor's level of control, participation, and knowledge of the infringement, rather than on the particular type of technology used or the particular type of business being conducted. Similarly, the exemption is available to any person engaging in the covered activity, not limited to those falling within a defined category of "service provider."

A decision was made not to attempt to codify industry-specific codes of conduct or detailed notification procedures at this time. The bill does not foreclose these possibilities, however, should the parties who will be affected directly by the provisions of this bill concur that they are desirable. It also provides certain legal protections for parties who act responsibly to assist in preventing infringement.

SECTION BY SECTION ANALYSIS

SEC. 1 SHORT TITLE

This act may be referred to as the "On-Line Copyright Liability Limitation Act".

SEC. 2. LIMITATIONS ON LIABILITY

Paragraph (a) would amend Chapter 5 of Title 17, U.S. Code, the chapter setting out what constitutes infringement and establishing remedies, to add a new section 512, entitled "Limitations on liability relating to material on-line." Paragraph (a) contains the substance of the new exemption.

Paragraph (a)(1) provides an exemption from both liability for direct infringement and vicarious liability, based solely on acts of transmitting or otherwise providing access to material online, if certain criteria are met. The exemption does not specify any particular right of the copyright owner under section 106; it would excuse the infringement of any of the rights.

If a person making use of copyrighted material on-line does not qualify for the exemption because of a failure to fall within one or more of the criteria, that does not mean that the person is necessarily liable for infringement. If the exemption does not apply, the doctrines of existing law will come into play, and liability will only attach to the extent that the court finds that the requirements for direct infringement, contributory infringement or vicarious liability have been met, and the conduct is not excused by any other exception or limitation.

"Transmitting" refers to moving material from one place to another so that it is received beyond the place from which it is sent. "Providing access" is a broader term; it could be accomplished by transmitting or by otherwise placing material on-line in a location where individuals may gain access to it on demand. The terms "transmitting" and "providing access" are intended to cover any means of accomplishing these acts. Such means could include any of the following: the carriage and routing of telecommunications signals; the services of on-line service providers or Internet access providers; the operation of bulletin boards; and the sending of private electronic or real-time communications.

The term "solely" is intended to make clear that the exemption applies only to the acts of transmission or providing access in themselves. If the person engaging in these acts also makes further use of the copyrighted material, such as making additional copies or using copies for other purposes, the exemption will not apply.

CRITERIA

The exemption is aimed essentially at passive, intermediary types of conduct. The criteria determining its applicability are adapted from a combination of case law and prior discussions of the issue in Congress in the last session. Some of the concepts are similar to those specified in the "passive carrier" exemption in section 111(a)(3) of the Copyright Act.[1] The overall goal is to exempt conduct where liability does not seem appropriate because of a low level of participation, control and knowledge, while at the same time ensuring that adequate incentives remain to assist copyright owners in preventing infringement, without ensuring that adequate incentives remain to assist copyright owners in preventing infringement, without obligating service providers generally to monitor or police communications over the Internet.

The failure to meet any one of the criteria would disqualify a person from the benefit of the exemption, since the person would then be performing a more active or knowledgeable role in distributing the infringing material. The ordinary rules of respondeat superior and enterprise liability would determine whether conduct by someone acting on behalf of the person seeking the exemption is attributed to that person.

The first three criteria all relate to the concept of acting as an intermediary in the chain of dissemination, rather than an initiator or director of the dissemination of the material.

Subparagraph (A)

The first criterion is that the person seeking the exemption did not initiate the circulation of the infringing material. Someone else was responsible for placing it on-line. For example, a service provider would not be disqualified under this criterion where a work was placed on-line by a subscriber.

Subparagraph (B)

The second criterion is that the person has no control over the content of the material: he or she did not create the material, choose it, or make any changes in it.

Subparagraph (C)

The third criterion requires that the person not be the one to decide who will receive the material. The fact that the person may have control over the universe of possible recipients, for example by controlling the list of subscribers to an on-line service or a bulletin board, would not disqualify him or her, since the choice of all subscribers does not determine which subscriber receives which material.

Subparagraph (D)

The fourth criterion rules out the possibility of receiving a financial benefit directly from a particular act of infringement. It would prevent someone who obtained a percentage of the revenue on each piece of pirated software transmitted from claiming the benefit of the exemption. It would not, however, bar someone whose financial benefit consisted of charging users of its service by the length of the message (per number of bytes, for example) or by time unit.

[1] That section exempts from liability secondary transmissions made by a carrier who "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities consist solely of providing wires, cables, or other communications channels for the use of others: *Provided*, That the provisions of this clause extend only to the activities of said carrier with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions." 17 U.S.C. §111(a)(3).

Subparagraph (E)

The fifth criterion requires that the person not play an active role in encouraging others to use the infringing material. The exemption would not be available to one who affirmately sponsored, endorsed or advertised the material—acts that are likely to lead to greater dissemination to a wider audience, and therefore greater harm to the copyright owner. Accordingly, such acts should engender some degree of responsibility, and it is reasonable to expect the actor to check the material being recommended (which would not be necessary if the exemption applied). Hyperlinking in and of itself would not be disqualifying under this criterion, to the extent that it is purely informational and directional. If, however, the context or presentation indicates an affirmative recommendation, a higher level of care would be appropriate, and the exemption would not apply.

Subparagraph (F)

The sixth and final criterion is a knowledge standard. If the person knows of the infringement, he or she should not be entirely exempt. The level of knowledge required is critical. If the exemption were limited to actual knowledge, it would provide an incentive to look the other way and deliberately avoid learning of the infringement. At the other extreme, a general negligence standard would be too broad to the extent that it could be interpreted to impose an affirmative duty to investigate, since service providers should not have a duty to investigate every transmission taking place through their services.

Subparagraph (F) therefore adopts an intermediate standard: if a person becomes aware of information that causes suspicion, he or she should have some obligation to check further. Such information may be obtained through the receipt of a notice from a copyright owner, or may be provided independently in the course of ordinary business. For example, a service provider who learns that a subscriber is operating a bulletin board called "PIRATES-R-US," or "POP MUSIC FOR FREE," and makes no inquiries and takes no further action should not obtain the benefit of this exemption. On the other hand, the service provider should not have to check sites or transmissions in the absence of obtaining such information. In other words, a red flag should not be ignored, but a provider should not ordinarily be required to go out and search for red flags.

The bill incorporates these concepts in two clauses within paragraph (a)(1). Clause (i) of subparagraph (F) sets a general standard of "does not know, and is not aware by notice or other information indicating, that the material is infringing." The language "is not aware" is a higher standard than "is in possession of facts," since a person may have facts within his possession, for example in a file somewhere, without being aware of them. The information need only indicate that the material is infringing, however; this would cover the type of red flag discussed above, and would not require such evidence as would be sufficient to establish infringement in a court of law. A separate sentence at the end of paragraph (a) states explicitly that "[n]othing in [that clause] shall impose an affirmative obligation to seek information described in such clause." In other words, the knowledge standard in the clause does not itself impose any obligation to monitor for infringement or to search out suspicious information. Once one becomes aware of such information, however, one may have an obligation to check further.

The other way to meet the subparagraph (F) criterion is if the person is prohibited by law from accessing the material. For example, the Electronic Communications Privacy Act makes it unlawful to access private e-mail communications. 18 U.S.C. §2510 *et seq.* In such circumstances, the exemption would be available without reference to the person's level of knowledge.

Many of the circumstances proposed for exemptions last year in the course of negotiating draft bill language would fall within the scope of this general exemption. The exemption would clearly cover the mere provision of physical facilities, such as lines or cables. It would also cover various activities that have been referred to as "mere conduit services," including the provision of local access, local exchange, telephone toll, trunk line, or backbone services, since the concept of "mere conduit" was similarly based on the passive, non-participatory nature of the activity. In addition, acts of hosting or operating bulletin boards and web pages would fall within the scope of the exemption where the operator does not have the requisite level of control or knowledge of infringing postings or content. The transmission of private or real time electronic communications such as e-mail would be exempted where the law does not permit the service provider to access the communication.

Paragraph (a)(2) deals with contributory infringement. Because contributory infringement, unlike direct infringement and vicarious liability, contains a knowledge requirement, it is treated separately. This subparagraph substantially limits remedies available for contributory infringement for conduct that qualifies for the exemption from liability for direct infringement or vicarious liability under subparagraph (1). In such cases, no monetary remedies will be available, and a court could issue an injunction requiring acts such as removing or blocking access to infringing material, only to the extent such acts are technically feasible and economically reasonable. The rationale for not barring injunctive relief is that a person who knows or should know of the infringement, and can reasonably do something to prevent it, should continue to have some legal incentive to do so. In many cases, a service provider may be the only person capable as a practical matter of preventing infringing material from being transmitted around the world, or the only one over whom a copyright owner can obtain jurisdiction.

Paragraphs (b) through (d) are intended to protect providers when they remove, disable or block access to material and remove possible disincentives to cooperate with copyright owners by taking steps to prevent infringement. These paragraphs ensure that a person who responds to information indicating infringement by removing, disabling or blocking access to material will not be penalized for having done so.

Paragraph (b) is essentially a "Good Samaritan" defense. It ensures that a person who acts responsibly upon obtaining information indicating an infringement, whether by receiving a notice or otherwise, and removes, disables or blocks access to the relevant material, cannot be held liable for having done so. This section would block claims by anyone based on the take-down itself (e.g., interference with contract claims).

Paragraph (c) preserves potential legal defense. It ensures that whatever decision is made by a person who has obtained information indicating infringement, whether to remove, disable or block access to the material, or not to do so because of a potential defense, cannot be used against that person in an infringement suit.

Paragraph (d) protects against losses caused by reliance on false information. It provides penalties for knowing material misrepresentations that material on-line is infringing, allowing the recovery of any damages incurred by a person who relies on such misrepresentations in removing, disabling or blocking access to such material.

COMPARISON TO EXISTING LAW

This exemption supplements doctrines of existing law, including contributory infringement and vicarious liability; it does not supersede or alter them. In some circumstances, it would exempt a person from liability where these doctrines would lead to the same result. In other circumstances, it would provide greater immunity, exempting a person where existing law would impose liability. While some of the criteria in paragraph (a)(1) are similar to some of the requirements for contributory infringement or vicarious liability, they are also narrower in certain respects, as described below. This exemption is not intended to indicate to the courts that the elements of contributory infringement or vicarious liability should be narrowed generally, or interpreted in accordance with the language of this provision. The intent is to continue the common law doctrines unchanged, and allow the courts to continue to develop them.

Direct infringement

Under current law, a person is liable for direct infringement who engages in an act within section 106 without authorization, with or without knowledge of infringement. The exemption would remove liability for a person who engages in such acts in the course of transmitting or otherwise providing access to material on-line in a passive, limited way, without the defined level of knowledge.

Vicarious liability

Under current law, a person is vicariously liable for the infringement of another if he has the right and ability to control the infringement, and receives a direct financial benefit, with or without knowledge of infringement. The exemption would add an element of actual control, require a more direct link to an infringement, and add a knowledge requirement. It would thus remove liability for a person who has no actual control of the placement of the material on-line, its content, or its particular recipients, if he or she receives no direct financial benefit attributable to a particular infringement, and does not have the defined level of knowledge.

Contributory infringement

Under current law, a person is liable for contributory infringement who induces, causes or materially contributes to another's infringement, knowing or having reason to know of the infringement. The exemption would remove monetary liability, and place some limits on injunctive relief, where the contribution to the infringement is of a passive nature and where the person has no actual knowledge and is not aware of information indicating infringement (but meets the lower standard of having reason to know).

Hearings on this bill will be conducted in the Judiciary Subcommittee on Courts and Intellectual Property, which I chair, simultaneously with a bill to implement the WIPO treaties negotiated in Geneva, Switzerland in December, 1996. The implementation legislation will be introduced soon after the introduction of this bill. It is my intent to move the bills together.

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