

»Business Alert

March 2011— WHITE HOUSE LOOKS TO CONGRESS FOR ADDITIONAL TOOLS TO COMBAT INTELLECTUAL PROPERTY INFRINGEMENT

On March 15, 2011, the White House released its 20 page white paper, the Administration's White Paper on Intellectual Property Enforcement Legislative Recommendations, wherein it proposed sweeping revisions to U.S. copyright law, including making "illegal streaming" of audio or video a federal felony and allowing government agents to wiretap suspected infringers. Furthermore, the Obama administration called on the U.S. Congress to fix "deficiencies that could hinder enforcement" of intellectual property laws.

The Obama administration has shown that it is willing to aggressively enforce intellectual property laws as evidenced by its noteworthy November 2010 "Cyber Monday Crackdown" where over 82 Internet domains belonging to alleged infringers were seized through the joint efforts of U.S. Immigration and Customs Enforcement (ICE) and Department of Justice.

In the report, the White House specifically targets "illegal streaming of content" and is concerned that such content is not specifically covered by criminal law, saying "questions have arisen about whether streaming constitutes the distribution of copyrighted works." To resolve that ambiguity, the White House recommends a new law to "clarify that infringement by streaming, or by means of other similar new technology, is a felony in appropriate circumstances."

In particular, the report advises Congress that "foreign-based and foreign-controlled Web sites raise particular concerns for U.S. enforcement efforts." In the past, the U.S. has had particular difficulty protecting domestic rights holders from unauthorized activities by Web sites based in Sweden and Russia. Although the U.S. has had some success in pressuring foreign governments to prosecute the Web site owners, such foreign-based Web sites continue to operate and stream unauthorized content. Moreover, the administration contends that civil enforcement penalties alone have not deterred infringers from streaming rights holder's content without authorization. As a result, the administration argues that Congress should revise existing law to criminalize certain infringement matters. However, the report did not specify which instances of infringement should be prosecuted as a crime aside from "appropriate circumstances."



Further, the White House requested additional tools for enforcement of intellectual property rights. The White House specifically recommended that wiretaps be conducted in

investigations of copyright and trademark infringement, arguing that move “would assist U.S. law enforcement agencies to effectively investigate those offenses.” Under current federal law, wiretaps may only be conducted in investigations of serious crimes and offenses such as material support of terrorism and use of weapons of mass destruction. Thus, the White House has requested that Congress significantly revise federal law to place investigations of copyright and trademark infringement on par with investigations of supporters of terrorism.

The White House has also requested that the administration be granted additional rights to cooperate with rights holders during investigations of copyright and trademark infringement. For example, the administration is proposing that if the Department of Homeland Security seizes circumvention devices used to circumvent DVD-decoding software, the administration should be permitted to “inform rights holders,” “provide samples of such devices,” and assist rights holders “in bringing civil actions.” Currently, government agencies are not expressly permitted to share information with private rights holders obtained during investigations. Thus, the administration contends that allowing the government to assist rights holders through information sharing will benefit enforcement because rights holders will have the information required to take appropriate steps to halt further infringement.



Finally, the administration recommends that Congress create a right of public performance for sound recording transmitted by over-the-air broadcast stations. “Historically, in the U.S., there has been no right of public performance for sound recordings transmitted by over-the-air stations.” The administration argues that the revisions are necessary because the absence of the right of public performance places domestic rights holders “at a disadvantage internationally.” Currently, domestic copyright holders cannot collect overseas royalties when foreign radio stations play their music because such right does not exist in the U.S.

The White House report is further evidence that the Obama Administration considers enforcement of intellectual property rights a high priority. The administration’s request of additional rights for copyright owners, such as the right of public performance, will be welcomed by the business community. However, the administration’s request for statutory authority to allow wiretaps in support of infringement investigations will be viewed as controversial and could have wide ranging effects on personal property and privacy rights. Accordingly, there is no doubt that the legal and business communities will closely monitor the progress of the administration’s proposals in Congress.

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