Coalition Concerns About S. 2395

S. 2395 Would Harm Information Technology Companies, Internet Service Providers, Universities, Libraries, and Consumers

As introduced, S. 2395, the Anticounterfeiting Amendments of 2002, was billed as targeting "organized criminal counterfeiting enterprises" by extending existing anticounterfeiting laws to physical holograms placed on packaging or embedded in the face of CDs, DVDs and computer programs. Additionally, S. 2395 was intended to improve enforcement of the criminal anticounterfeiting provisions by granting a private cause of action. However, nothing in S. 2395 limited its reach to "organized criminal" activity.

In fact, as reported out of the Senate Judiciary Committee without any hearing, S. 2395 has a much broader scope than originally proposed. It now applies to digital watermarks (e.g., identifying alterations of the digital 0's and 1's representing audio and video content), so the otherwise lawful copying and transmitting of digital works could trigger liability under S. 2395. This means that S. 2395 places an additional layer of criminal and civil liability on top of activities currently regulated by the Copyright Act. Thus, this new legislative overlay prohibits activity specifically permitted by the copyright law and imposes significantly higher penalties for technical copyright infringements.

- **Harm to Database Publishers and Users.** While copyright protects original databases, it does not protect individual facts within a database. S. 2395, however, might prohibit the extraction of watermarked facts from computerized databases. S. 2395 thus implicates the database protection issue that has been vigorously debated for the past four Congresses, and threatens a wide range of economic activity and scientific research.

- **Harm to Interoperability.** Copyright permits the reproduction of interface specifications and code essential for interoperability. S. 2395, however, would allow the proprietor of a dominant software platform or a video game company to use digital watermarks to frustrate legitimate competition. A company could design its software platform to permit applications to run on the platform only if they contain an "authorized" digital watermark licensed by the company. An independent software company would violate S. 2395 if it copied the watermark solely for the purpose of allowing its original application to run on the platform.
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- **Harm to Universities, Libraries, and Consumers.** Copyright permits the copying of works in a wide variety of academic, library, and private consumer settings. S. 2395 would outlaw these reproductions if they involve making and providing to others copies of works containing digital watermarks. S. 2395 would also inhibit the removal of the watermarks before the making of these lawful copies. S. 2395's consideration requirement would be easily met because libraries often receive reimbursement for the costs involved in making copies for interlibrary loans, and scholars frequently exchange materials of mutual interest.

- **Harm to Internet Service Providers.** Title II of the Digital Millennium Copyright Act (DMCA) limits the remedies that can be obtained against Internet service providers for the infringing activities of their users. S. 2395 could be applied in a manner that defeats the DMCA's safe harbors, and exposes ISPs to remedies not available under the DMCA.

- **Harm to User Privacy.** Computer programs that monitor a consumer's use of a copyrighted work -- "spyware" -- could fall within the scope of S. 2395 as amended. Further, as part of a verification process, operating systems or players could be designed to run the work only if the spyware is present. In that event, S. 2395 might prohibit the deletion of the spyware and its replacement with a program that "spoofs" the operating system or player so that the work can be used lawfully and privately.

- **Criminal Penalties for Minor Infringements.** S. 2395 likewise imposes more severe penalties than the Copyright Act for identical behavior. Criminal liability under the Copyright Act attaches only for willful infringements that result in private financial gain or copies with a retail value of more than $1,000. By contrast, distributing a copy of even one song containing a digital watermark could trigger criminal liability under S. 2395. Thus, S. 2395 could lead to criminal sanctions for minor infringements by ordinary consumers, notwithstanding the bill's stated purpose of targeting "organized criminal counterfeiting enterprises [that] threaten[] the economic growth of United States copyright industries…".

- **Excessive Civil Remedies.** S. 2395 also gives civil plaintiffs more remedies than are available under the Copyright Act for identical conduct, including the potential for far greater statutory damages as well as treble damages from repeat offenders.

- **Harm to Consumer Electronics and Computer Manufacturers.** S. 2395 could have the practical effect of requiring consumer electronics and computer manufacturers to reconfigure their products to respect instructions contained in
digital watermarks. This would undermine the "no mandate" provision of Title I of the DMCA by which Congress sought to ensure that manufacturers would not have to design devices to respond to every conceivable digital rights management scheme, especially unilateral ones not developed through a consensus process.

S. 2395 should not proceed to a vote on the Senate floor until all these problems are addressed to the satisfaction of all stakeholders. The carefully crafted balances of the Copyright Act should not be circumvented by hastily drafted and considered amendments that have not been the subject of even one hearing.