

## “The IP Czar Chronicles”: Coming to a White House Near You

Not since the election of Barack Obama as the 44th President of the United States of America has the creative community had such a significant stake in the selection of a political leader, as it does in the appointment of the first ever intellectual property enforcement coordinator (IPEC), which was previously and affectionately referred to as the “IP czar.”



### Preview

The IPEC is a by-product of the Prioritizing Resources and Organization for Intellectual Property Act (Pub. L. 110-403, the PRO-IP Act), which President George W. Bush signed into law on Oct. 13, 2008.<sup>1</sup> The PRO-IP Act was enacted in order to “enhance remedies for violations of intellectual property laws” and to allow rights holders to enforce their intellectual property rights more aggressively.

The act strengthens efforts to enforce rights to intellectual property by (1) increasing penalties for piracy, counterfeiting, and other forms of infringement; (2) providing resources allocated to the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) to enable these agencies to coordinate federal and state antipiracy task forces; and (3) encouraging cooperation with other countries in the fight against international infringement of IP rights.

The PRO-IP Act is a very broad and far-reaching piece of legislation in that it incorporates several existing statutes and involves a variety of long-standing governmental bodies. In summary, the PRO-IP Act—

- amends federal copyright law to provide that copyright registration requirements apply to civil (not criminal) infringement actions and to provide a safe harbor for copyright registrations that contain inaccurate information;
- amends the Trademark Act to revise treble damages provisions and double statutory damages in counterfeiting cases; to prohibit the transshipment and exportation of goods bearing infringing

marks; and to prohibit the importation (current law), transshipment, or exportation of copies or phonorecords without the authority of the copyright owner;

- amends the Computer Crime Enforcement Act to require the DOJ’s Office of Justice Programs to make grants for training, prevention, enforcement, and prosecution of crimes involving the theft of intellectual property and infringement of IP rights;
- requires the FBI to create an operational unit to work with the DOJ’s Computer Crime and Intellectual Property section on the investigation and coordination of complex intellectual property crimes and to implement a comprehensive program to deal with intellectual property crimes; and
- directs the U.S. attorney general to create a task force to develop and implement a comprehensive plan to investigate and prosecute international organized crime syndicates engaging in crimes relating to intellectual property theft and, subject to appropriations, to deploy five additional IPECs in foreign countries.

The PRO-IP Act also directs the President to appoint an intellectual property enforcement coordinator, who will—

- chair the Interagency Intellectual Property Enforcement Advisory Committee established by the act; and
- coordinate the development and assist in the implementation of the Joint Strategic Plan against counterfeiting and piracy created by the interagency advisory committee.<sup>2</sup>

The IPEC will replace the National Intellectual Property Law Enforcement Coordination Council, a group co-chaired by the director of the U.S. Patent and Trademark Office that was responsible for coordinating U.S. domestic and international intellectual property enforcement activities. The new IPEC position is more comprehensive and will potentially yield greater influence. As a member of the executive branch, the IPEC will report directly to the President and Congress, which presumably will give the IPEC greater visibility on Capitol Hill and direct access to the President and eliminate the constraints of being associated with a particular agency or department.

One of the IPEC's primary duties is to act as chair of the Interagency Intellectual Property Enforcement Advisory Committee, which will consist of several officials from the Office of Management and Budget, Department of Justice, U.S. Patent and Trademark Office, Office of the U.S. Trade Representative, U.S. Copyright Office, Department of Homeland Security, and Department of Health and Human Services. The Joint Strategic Plan that the IPEC is responsible for developing and implementing will establish domestic and international programs designed to enforce the rights of intellectual property holders and to combat piracy and counterfeiting worldwide.

Rep. John Conyers (D-Mich.) introduced the original bill (H.R. 4279) in the U.S. House of Representatives on Dec. 5, 2007, and the House passed it on May 8, 2008. The Senate unanimously approved a revised version of the bill (S. 3325), which was sponsored by Sen. Patrick Leahy (D-Vt.), on Sept. 26, 2008 (two days later, the House passed the revisions by an overwhelming majority of 381-41),<sup>3</sup> but only after the deletion of the more controversial provisions and a long vigorous debate (not among senators and representatives in the halls of Congress but between entertainment companies and consumer advocate groups on the Internet and throughout the blogosphere).

### Cast and Synopsis

The cast of characters on both sides of the debate reads like a Hollywood "Who's Who." Proponents of the bill were primarily the providers of the content at issue: major music, entertainment, and business organizations, including the Recording Industry Association of America, Motion Picture Association of America, U.S. Chamber of Commerce, National Association of Manufacturers, labor unions, AFL-CIO, and American Federation of Musicians.

Supporters of the bill claim that strict enforcement of intellectual property rights is critical to the enrichment of American culture and to the development of the U.S. economy. The music industry in particular has a solid case on the economic impact of a weak enforcement policy. According to *Rolling Stone*,<sup>4</sup>

- In 2000, U.S. consumers bought 785.1 million albums; in 2006, that number decreased to 588.2 million (a figure that includes both compact disks and downloaded record albums according to Nielsen SoundScan).
- In 2000, the 10 top-selling record albums in the United States sold a combined 60 million copies; in 2006, the top 10 sold just 25 million copies.
- Since 2000, more than 5,000 recording company employees have been laid off.
- Since 2003, about 2,700 record stores have closed across the country.
- In 2006, the 89-store Tower Records chain, which represented 2.5 percent of overall retail sales, went out of business, and Musicland, which operated

more than 800 stores under the Sam Goody brand, among others, filed for bankruptcy.

Opposition to the bill came from academics and public interest groups, including the American Association of Law Libraries, American Library Association, Consumer Federation of America, Consumers Union, Digital Future Coalition, Electronic Frontier Foundation, Essential Action, IP Justice, Knowledge Ecology International, Medical Library Association, Public Knowledge, and Special Libraries Association. Opponents feared that the legislation imposed unfair penalties on noninfringing third parties and allowed the federal government to pursue enforcement on behalf of private holders of rights. As a result of opponents' efforts, some of the more controversial provisions of the bill were omitted prior to its submission to the President for signature. The provisions that were omitted included the following:

- the increase in damages awarded for file sharing from a per album to a per song basis;
- the creation of an entire intellectual property enforcement agency (effectively another level of federal bureaucracy); and
- the power of the attorney general to file civil lawsuits for copyright infringement on behalf of individual owners (which the DOJ vehemently opposed).

The clause that gave the attorney general the power to initiate civil suits received the loudest objections. The Recording Industry Association of America, for example, has sued more than 30,000 individuals for infringement. The association suffers no apparent obstacles to enforcing the rights of its members; however, under this provision, the attorney general would have the authority to sue infringers on behalf of the association. Thus, in effect, the DOJ would have served as "pro bono lawyers for private copyright holders regardless of their resources"; the DOJ participated in the successful challenge to remove this provision.

### Act 1, Scene 1

Once the bill became law and the interested parties returned to their respective corners, the next question became, "Who will be appointed as the IP czar?" Answers to that question began circulating almost immediately. Critics opposed to the PRO-IP legislation were concerned that the law serves only the interest of major media, music, and entertainment companies and that the cabinet-level appointee would be a mere figurehead put in place to project the image of a supportive and proactive initiative to protect intellectual property. The fact that major media companies not only backed but also enthusiastically lobbied for the bill provided one indication that the very first IP czar might be content-friendly. The other indication came in April 2009,

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when Sen. Leahy presented a list of potential candidates, which was published in the *National Journal*.<sup>5</sup> The list consisted of nine names—half of them attorneys, administrators, staffers, and executives who have either lobbied for or have direct ties to the music and entertainment industry. The following list provides a brief description of five of those candidates:

- Michele Ballantyne—senior vice president for federal government and industry relations at the Recording Industry Association of America; former general counsel for Sen. Tom Daschle (D-S.D.); former special assistant to President Clinton, and special counselor John Podesta, White House chief of staff, from 1999 to 2001;
- Alec French—vice president for government relations at NBC Universal; former minority counsel for the House Subcommittee on Courts, the Internet, and Intellectual Property, serving under Rep. Howard Berman (D-Calif.); and former legislative counsel and director of congressional relations for the Interactive Digital Software Association from 1997 to 2000;
- Neil MacBride—associate deputy attorney general; former vice president of antipiracy and general counsel to the Business Software Alliance; and former aide to Vice President Joe Biden;
- Hal Ponder—director of government relations for the American Federation of Musicians; and
- Shira Perlmutter—executive vice president for global legal policy at the International Federation of the Phonographic Industry<sup>6</sup> and former vice president and associate general counsel for intellectual property policy at Time Warner.

Many of the names on this short list are active Washington lobbyists, which does not bode well for the public interest and consumers' rights organizations interested in new business models or the advent of technology and innovation. Although there may be an issue as to whether the list of candidates for the IP czar position

can withstand the White House ethics and lobbyist stress test, at an event sponsored by the Motion Picture Association of America, Vice President Joe Biden explained to a group of entertainment executives that the Obama administration understands the needs of the film industry and promised to appoint “the right person” to serve as IP czar.<sup>7</sup> To be continued. **TFL**

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### Endnotes

<sup>1</sup>The White House, Office of the Press Secretary, Fact Sheet: Protecting American Innovation (Oct. 13, 2008), available at [www.whitehouse.gov/news/releases/2008/10/20081013-7.html](http://www.whitehouse.gov/news/releases/2008/10/20081013-7.html).

<sup>2</sup>Title III: Prioritizing Resources and Organization for Intellectual Property Act (Pub. L. 110-403).

<sup>3</sup>Open Congress, available at [www.opencongress.org/bill/110-s3325/show](http://www.opencongress.org/bill/110-s3325/show).

<sup>4</sup>Brian Hiatt and Evan Serpick, *The Record Industry's Decline: Record sales are tanking, and there's no hope in sight: How it all went wrong*, ROLLING STONE (June 28, 2007), available at [www.rollingstone.com/news/story/15137581/the\\_record\\_industrys\\_decline](http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline).

<sup>5</sup>Andrew Noyes, *The Short List: Leahy Will Float Names for IP Czar*, NATIONAL JOURNAL ONLINE (Nov. 14, 2008), available at [lostintransition.nationaljournal.com/2008/11/leahy-will-float-names-for-ip.php](http://lostintransition.nationaljournal.com/2008/11/leahy-will-float-names-for-ip.php).

<sup>6</sup>The International Federation of Phonographic Industry is the international equivalent of the Recording Industry Association of America.

<sup>7</sup>Richard Koman, *Biden to MPAA: You'll Love Our IP Czar*, ZDNET.com (April 24, 2009), available at [government.zdnet.com/?p=4696](http://government.zdnet.com/?p=4696).

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<sup>11</sup>In addition to leave for a “serious health condition,” employees may also be entitled to leave for the placement of a child with the employee for adoption or foster care, *see* 29 C.F.R. § 825.100, or leave to spend time with a relative engaged in certain military service, *see* 29 C.F.R. § 825.310.

<sup>12</sup>29 C.F.R. § 825.100.

<sup>13</sup>29 C.F.R. § 825.113.

<sup>14</sup>29 C.F.R. § 825.100.

<sup>15</sup>*Id.*

<sup>16</sup>*Windsor v. Parkway Sch. Dist.*, No. 4:06-cv-1310, 2008 U.S. Dist. LEXIS 3176, at \*20 (E.D. Mo. Jan. 15, 2008).

<sup>17</sup>*Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043 (8th Cir. 1999).

<sup>18</sup>*Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000).

<sup>19</sup>29 C.F.R. § 825.209.

<sup>20</sup>29 C.F.R. § 825.212.

<sup>21</sup>*See* EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002).

<sup>22</sup>29 C.F.R. § 825.312.

<sup>23</sup>*Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999).

<sup>24</sup>29 C.F.R. § 825.214.

<sup>25</sup>*Id.*

<sup>26</sup>*See* EEOC Enforcement Guidance, *supra* note 21.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.*