Congress and the public about the activities of federal agencies in the enforcement of federal law. Senator Hatch and I offer as an amendment to H.R. 3111 the text of a bill, S. 1769, which I introduced with Chairman Hatch on October 22, 1999. We both passed the Senate on November 5, 1999. This amendment will continue and enhance the current reporting requirements for the Administrative Office of the Courts and the Attorney General on the eavesdropping and surveillance activities of our federal and state law enforcement agencies.

For many years, the Administrative Office (AO) of the Courts has complied with the statutory requirement, in 18 U.S.C. §2519(3), to report to Congress annually the number and nature of federal and state applications for orders authorizing or approving the interception of wire, oral or electronic communications. By letter dated September 3, 1999, the AO advised that it would no longer report because “as of December 21, 1999, the report will no longer be required pursuant to the Federal Reports Elimination and Sunset Act of 1995.” I commend the AO for alerting Congress that their responsibility to the American people, and the American public, has ended.

The AO has done an excellent job of preparing these reports, and we need to continue the AO’s objective work in a consistent manner. If another agency took over this important task at this juncture and the numbers came out in a different format, it would immediately generate questions and concerns over the legitimacy and accuracy of the contents of that report.

In addition, it would create difficulties in comparing statistics from prior years going back to 1969 and complicate the job of congressional oversight. Furthermore, transferring this reporting duty to another agency might create delays in issuance of the report since no other agency has the methodology in place. Finally, federal, state and local agencies are well accustomed to the reporting methodology developed by the AO. Notifying all these agencies that the reporting standards and agency have changed would inevitably create more confusion and more expense as law enforcement agencies across the country are forced to learn a new system and develop a liaison with a new agency.

The system in place now has worked well and we should avoid any disruptions. We know how quickly law enforcement may be subjected to criticism over their use of these surreptitious surveillance tools and we should avoid aggravating these sensitivities by changing the reporting agency and methodology on little to no notice. I am concerned that H.R. 3111, which is considered today as H.R. 3456, which has been reported by the Judiciary Committee had unanimously reported.

This legislation has already traveled an unnecessarily bumpy road to get to this stage of final passage, and it should be sent promptly to the President’s desk.

On July 1, 1999, the Senate passed four intellectual property bills, which Senator Hatch and I had joined in introducing and which the Judiciary Committee had unanimously reported. Each of these bills (S. 1257, the text of which is considered today as H.R. 3456; S. 1258, the “Patent Fee Integrity and Innovation Protection Act”; S. 1259, the “Trademark Amendments Act”; and S. 1260, the “Copyright Act Technical Corrections Act”) make important improvements to our intellectual property law. Congress should be congratulated for the quality of work that Senator Hatch and I have done on these bills.

This legislation is today passing an important bill, S. 1257, which is the Hatch-Leahy-Schumer “Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.” This legislation should help our copyright industries, which in turn helps both those who are employed in those industries and those who enjoy the wealth of consumer products, including books, magazines, movies, and computer software, that makes the vibrant culture of this country the envy of the world.

This legislation has already traveled an unnecessarily bumpy road to get to this stage of final passage, and it should be sent promptly to the President’s desk.

The requirement for preparation of the wiretap reports will soon lapse so I am delighted to see the Senate take action on the legislation to continue the requirement for submission of the wiretap reports and to update the reporting requirements for both the wiretap reports submitted by the AO and the pen register and trap and trace reports submitted by the Attorney General.

DIGITAL THEFT DETERRENCE AND COPYRIGHT DAMAGES IMPROVEMENT ACT OF 1999

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property laws, and I congratulate Senator Hatch for his leadership in moving these bills promptly through the Committee and the Senate.

Three of those four bills then passed the House without amendment and were signed by the President on August 5, 1999. The House sent back to the Senate S. 1257, the “Digital Theft Deterrence and Copyright Damages Improvement Act,” with two modifications which I will describe below. Working with the leadership of the Senate, and the House, we agreed upon additional revisions in the bill, which was then introduced as H.R. 3456 and passed by the House yesterday in time for Senate consideration before the end of this congressional session.

I have long been concerned about reducing the levels of software piracy in this country and around the world. The theft of digital copyrighted works and, in particular, of software, results in lost jobs to American workers, lost taxes to Federal and State governments, and lost revenue to American companies. A recent report released by the Business Software Alliance estimates that worldwide theft of copyrighted software in 1998 amounted to nearly $11 billion. According to the report, if this “pirated software has instead been legally purchased, the industry would have been able to employ 32,700 more people. In 2008, if software piracy remains at its current rate, $52,700 would be lost in the computer software industry.” This theft also reflects losses of $991 million in tax revenue in the United States.

These statistics about the harm done to our economy by the theft of copyrighted software alone, prompted me to introduce the “Criminal Copyright Improvement Act” in both the 104th and 105th Congresses, and to work for passage of this legislation, which was finally enacted as the “No Electronic Theft Act,” Pub. L. 105-147. The current rates of software piracy show that we need to do better to combat this theft, both with enforcement of our current copyright laws and with strengthened copyright laws to deter potential infringers.

The Hatch-Leahy-Schumer “Digital Theft Deterrence and Copyright Damages Improvement Act” would help provide additional deterrence by amending the Copyright Act, 17 U.S.C. §504(c), to increase the amounts of statutory damages recoverable for copyright infringements. These amounts were last increased in 1988 when the United States acceded to the Berne Convention. Specifically, the bill would increase the cap on statutory damages by 50 percent, raising the minimum from $500 to $750 and raising the maximum from $20,000 to $30,000. In addition, the bill would raise from $100,000 to $150,000 the amount of statutory damages for willful infringements.

Congress, in determining the amount of statutory damages in any given case would have discretion to impose damages within these statutory ranges at just and appropriate levels, depending on the harm caused, ill-gotten profits obtained and the gravity of the offense. The bill preserves provisions of the current law allowing the court to reduce the award of statutory damages to as little as $5 per work under certain circumstances, including when the infringement and the court to remit damages in certain cases involving nonprofit educational institutions, libraries, archives, or public broadcasting entities.

Finally, the bill provides authority for the Sentencing Commission expeditiously to fulfill its responsibilities under the “No Electronic Theft Act,” which directed the Commission to ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed. Since the time that this law became effective, the Sentencing Commission has not had a full slate of Commissioners serving. In fact, we have had no Commissioners since October, 1998. This situation was corrected on November 10th with the confirmation of seven new Commissioners.

As I noted, the House amended the version of S. 1257 that the Senate passed in July in two ways. First, the original House version of this legislation, H.R. 1761, contained a new proposed enhanced penalty for infringers who engage in a repeated pattern of infringement, but without any scienter requirement. I shared the concerns raised by the Copyright Office that this provision, absent a willfulness scienter requirement, would permit imposition of the enhanced penalty even against persons who negligently, albeit repeatedly, engaged in acts of infringement. Consequently, the Hatch-Leahy-Schumer bill, S. 1257, that we sent to the House in July avoided casting such a wide net, which could chill legitimate fair uses of copyrighted works. Instead, the House bill would create a new tier of statutory damages allowing a court to award damages in the amount of $250,000 per infringed work where the infringement is part of a willful and repeated pattern of infringement. The entire “pattern and practice” provision, which originated in the House, was removed from the version of S. 1257 sent back to the Senate.

Second, the original House version of this legislation provided a direction to the Sentencing Commission to amend the guidelines to provide an enhancement based upon the retail price of the legitimate products multiplied by the quantity of the infringing products, except where “the infringing products are substantially different from the product and there is substantial price disparity between the legitimate products and the infringing products.” This proposed direction appears to be under-inclusive since it would not allow a guideline enhancement in cases where fake goods are passed off as the real item to unsuspecting consumers, even though this is clearly a situation in which the Commission may decide to provide an enhancement.

In view of the fact that the full Sentencing Commission has not had an opportunity for the past two years to consider and implement the original direction in the “No Electronic Theft Act,” passing a new and flawed directive appears to be both unnecessary and unwise. This is particularly the case since the new Commissioners have already indicated a willingness to consider on their own any additional enhancements to the law in response to questions posed at their confirmation hearings, each of the nominated Sentencing Commissioners indicated that they would make this issue a priority. For example, Judge William Sessions of the District of Vermont specifically noted that:

If confirmed, our first task must be to address Congress’ longstanding directives, including implementation of the guidelines under the No Electronic Theft Act. Senator Hatch directed the Sentencing Commission to fashion guidelines under the NET Act that are sufficiently specific to deter such criminal activity. I personally favor addressing penalties under this statute expeditiously.

I fully concur in the judgment of Chairman Hatch that the Sentencing Commission directive provision added by the Senate is inappropriate. The House addressed these concerns by doing just that in the new version of the bill, H.R. 3456, which was introduced and passed by the House yesterday in time for Senate consideration before the end of the session.

This bill represents an improvement in current copyright law, and I commend its final passage.