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DOWNLOADING THAT 12-TRACK ALBUM COULD COST YOU \$360,000:¹ EXPLORING HOW THE PRO-IP ACT WILL AFFECT THE CONSUMER

by CHRISTY O'BERRY

Minnesota mother, Jammie Thomas, was sued by a record company for downloading 24 songs, which cost less than \$54 on a commercial site, and making them available to others through a peer-to-peer online file-sharing program.² Based on a jury instruction, which made electronic distribution on a

peer-to-peer network a violation of the copyright owners' exclusive right of distribution, "regardless of whether actual distribution has been shown," Thomas was penalized with damages upwards of \$222,000.³

Typically, a person who illegally downloads songs for their own enjoyment or personal use, a personal use infringer, is unaware of the penalties for illegally downloading songs and, therefore, the penalties do not serve as a deterrent.⁴ In fact, among those questioned, the biggest deterrent to illegal downloading was the potential for inadvertently downloading computer viruses.⁵ Several of the participants that admitted to illegally downloading songs said that they later purchased the album or later attended live shows.⁶ Should a personal use infringer be penalized for downloading a song when they later purchased the album or supported the artist in another way?

On October 13, 2008 former President George W. Bush signed into law the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act or Act).⁷ The Act increases the power of the federal government to protect intellectual property owners by creating a new position, the Intellectual Property Enforcement Coordinator, commonly referred to as the "IP Czar," who will oversee and coordinate domestic and international enforcement activities.⁸ Additionally, the Act increases penalties available in civil cases against trademark counterfeiters.⁹



Intellectual property covers a range of products, including patents, trademarks, and copyrights.¹⁰ Certainly, the big issue with counterfeit patents and trademarks is the health and safety of the consumer when purchasing counterfeit pharmaceuticals, electronics, and auto parts.¹¹ However, when it comes to copyright protection in the digital age, where music downloading is the norm, the law has been crafted in a way that protects big business rather than the consumer because it does not differentiate between the personal use infringer and the large-scale infringer, who illegally downloads songs, copies them, and sells them in the marketplace.¹²

Prior to the enactment of the PRO-IP Act, the Recording Industry Association of America (RIAA), whose goal is to “foster a business and legal climate that protects the authors of original works in music,” seemed to be concerned with digital music piracy by the personal use infringer over the large-scale infringer.¹³ In an attempt to stem illegal downloading, the RIAA began suing individuals that were illegally downloading music.¹⁴ In fact, in just over five years the RIAA sued over 35,000 individuals for illegal downloads.¹⁵

After suing several single mothers, a dead person, and a 13-year old girl, the RIAA realized that lawsuits against the individual infringer were not an effective or efficient deterrent of internet music piracy.¹⁶ The RIAA, however, did view the PRO-IP Act as an effective deterrent because, through the PRO-IP Act, the government acts as the watchdog and enforces IP rights.¹⁷

A copyright protects authors of “original works” for a fixed period of time, conferring exclusive rights on the copyright holder. Original works include literary, dramatic, musical, artistic, and other works.¹⁸ A work is created when it is fixed in a tangible medium such as a recording.¹⁹ Copyright infringement, or creating counterfeit works, is the unauthorized use of a copyrighted work, in a manner that violates one of the copyright owner’s exclusive rights, such as the right to reproduce or perform the copyrighted work, or to make derivative works.²⁰ Fair use is a defense to infringement that allows limited use of copyrighted material without requiring permission from the copyright holder.²¹

Part of the PRO-IP Act focuses on increasing penalties for copyright infringement.²² Statutory damages for the infringer, whether a personal use infringer or large-scale infringer, can be in the range of \$750 to \$30,000 for downloading a song that costs one dollar.²³ Neither the copyright law nor the PRO-IP

Act differentiates between the personal use infringer and the large-scale infringer.²⁴

The Electronic Frontier Foundation and Public Knowledge, two non-profit organizations that work to protect the public's interest in the digital age, argue that the Act goes too far to protect big business at the expense of the casual downloader and creates civil penalties that far outweigh the offense.²⁵ Other critics argue that copyright law should be crafted to encourage professional and amateur creativity while protecting the profits of the copyright holder, striking a balance between the needs of the artist and the interests of the consumer.²⁶

It is clear that the author of the PRO-IP Act, Senator Patrick Leahy, and the Act's supporters were concerned with protecting the public from counterfeit goods and preventing the theft of intellectual property for commercial advantage or activity rather than going after personal use infringers.²⁷ However, the broad language of the Act leaves open the potential for abuse because the Act does not make clear the reach of the term "commercial activity or advantage."²⁸

One of the most controversial, and as yet untested, provisions of the Act is the expansion of government power to seize equipment involved in making, or equipment with the potential for making, counterfeit goods.²⁹ Section 102 of the Act authorizes the government, in a civil action, to order the impounding of all means by which copyright protected material can be reproduced.³⁰ Read broadly, this provision could include a personal computer that was used to download *one* copyrighted work, be it a song or a movie.³¹

With the first 100 days of his Presidency behind him, President Barack Obama has yet to appoint the "IP Czar," despite pressure from several senators that backed the Act, which means it is unclear what the role of the "IP Czar" will be and even more what impact this Act will have on the protection of intellectual property.³² Intellectual property has been called the "petroleum of the 21st century,"³³ and the "lifeblood of our economy," therefore making its protection an increasing government concern.³⁴

NOTES

- 1 Richard Esguerra, "*PRO IP Act*" Aims to Increase Infringement Penalties and Expand Government Enforcement, DEEPLINKS BLOG, Dec. 7, 2007, <http://www.eff.org/deeplinks/2007/12/pro-ip-act-increase-infringement-penalties-and-dramatically-expand-government-enfor>.
- 2 Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1213, 1227 (D.Minn. 2008).
- 3 *Id.* at 1213.
- 4 Questionnaire of fourteen personal use downloaders by Christy O'Berry (Feb. 28, 2009) (on file with author) (consisting of questions related to the personal use downloader's activities over the past year with regard to illegal downloading and other related music purchases).
- 5 *Id.*
- 6 *Id.*
- 7 Alison Besunder & Joe Keeley, *PRO-IP Act Brings Major Changes to Intellectual Property Protection*, ARENT FOX, Dec. 11, 2008, http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_id=1884.
- 8 Bob Felber & Rick Sanders, *The "PRO-IP" Act of 2008*, MONDAQ, Oct. 31, 2008, <http://www.mondaq.com/article.asp?articleid=69010>.
- 9 *Id.*
- 10 *See Id.*
- 11 *Id.*
- 12 Esguerra, *supra* note 1.
- 13 Recording Industry Association of America Frequently Asked Questions, <http://www.riaa.com/faq.php> (last visited Mar. 9, 2009).
- 14 John Mahoney, *RIAA Jerks To Stop Suing Individuals For Online Piracy*, GIZMODO, Dec. 19, 2008, <http://gizmodo.com/5114101/riaa-jerks-to-stop-suing-individuals-for-online-piracy>.
- 15 *Id.*
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- 17 Mark Methenitis, *The PRO-IP Act and Movies and Music*, THE LAW OF THE GAME, Oct. 8, 2008, <http://lawofthegame.blogspot.com/2008/10/pro-ip-act-and-movies-and-music.html>.
- 18 DEP'T OF COM., PROTECT YOUR INTELLECTUAL PROPERTY: STOP TRADE IN FAKES! (2005).
- 19 *Id.*
- 20 *Id.*
- 21 *Id.*
- 22 Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403 (2008) [hereinafter *PRO-IP Act*].
- 23 Sherwin Siy, *Stacking Penalties Upon Penalties (PRO-IP Passes Senate)*, PUBLIC KNOWLEDGE, Sept. 26, 2008, <http://www.publicknowledge.org/node/1767>.
- 24 *Id.*
- 25 *Id.*
- 26 Lawrence Lessig, In Defense of Piracy, WALL ST. J., Oct. 11, 2008, <http://online.wsj.com/article/SB122367645363324303.html>.
- 27 Stephen J. Zralek & Dylan Ruga, *The PRO-IP Act: Another Weapon Against Our Failing Economy*, LANDSLIDE, Jan./Feb. 2009, at 35.
- 28 *Id.*

- 29 Holly Lance, The PRO-IP Act, MICH. TELECOMM. & TECH. L. REV. BLOG, Nov. 10, 2008, <http://blog.mttl.org/2008/11/pro-ip-act.html>.
- 30 See PRO-IP Act, *supra* note 22.
- 31 Felber, *supra* note 8.
- 32 See TECH DAILY DOSE, SENATORS PRESS OBAMA TO NAME IP CZAR, NAT. J., Mar. 23, 2009, <http://techdailydose.nationaljournal.com/2009/03/senators-press-obama-to-name-i.php>.
- 33 Interview with Rodrigo Leon Urrutia, Attorney, Silva & Cia., in Santiago, Chile (Mar. 5, 2009).
- 34 Zralek, *supra* note 27, at 37.