

Current Trends in Intellectual Property Protection and Enforcement

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Changes in the Law

In 2007, new legislation has been either introduced or proposed that would criminalize additional intellectual property infringements, and enhance the federal government's investigation of alleged intellectual property violations and enforcement of intellectual property rights. This legislation includes the Intellectual Property Protection Act of 2007, or IPPA, which was proposed by the Department of Justice in May, but has yet to find a congressional sponsor, and the Intellectual Property Rights Enforcement Act, or IPREA, introduced in the Senate in February and in the House of Representatives in September. There are already a number of federal statutes that criminalize certain intentional intellectual property infringements, such as the Economic Espionage Act and the Copyright Act. Trafficking in counterfeit goods is also a criminal offense. However, the IPREA and IPPA go further in coordinating the federal government's efforts in protecting U.S. intellectual property rights here and abroad. The IPPA also proposes significant increases in penalties for certain types of intellectual property infringement, creates a new crime of attempted copyright infringement (subject to the same criminal penalties as actual copyright infringement), and provides for more powerful tools, such as wire tapping, for use by law enforcement personnel in investigating intellectual property infringement.

I see both positive and negative aspects to these laws. Certainly the protection of intellectual property rights is an important matter, especially abroad. And providing for uniform and coordinated oversight by the federal government, as proposed in the IPREA, could be quite valuable in that regard. However, these proposed laws seem to reflect primarily the concerns of the entertainment and technology industries, and do not appear to provide equal protection for the public, such as the right to fair use of copyrighted materials. To that point, the IPPA's new crime of attempted copyright infringement could easily ensnare academics, researchers and others who intend only to make fair use of copyrighted materials. For instance, if a professor gathered articles, books and photographs in support of a class lesson, and intended to copy and distribute excerpts of these materials to his class (an activity he believes is protected as fair use under the Copyright Act), would the professor nonetheless be guilty of "attempted" copyright infringement? Would it depend on whether he did, in fact, make a fair use of the materials? What if he was wrong in his analysis of whether his proposed use was fair use? This situation may seem strange, but it would be entirely possible under the IPAA since the IPAA does not define "attempted" copyright infringement. Thus, unless the IPPA and IPREA were revised to provide balanced protections for both the intellectual property owners and the public, I would view this new legislation negatively.

The IPPA and IPREA represent the continuation, and perhaps acceleration, of a trend that began years ago, due primarily to copyright infringement using the Internet. I expect to see this trend continue. We will continue to work with our clients to make them aware of the seriousness of intellectual property infringement, and help them develop policies and procedures to not only

protect their own intellectual property, but to avoid infringing on others' intellectual property rights. This will be most important in the areas of product and service development. During these activities, our objective is to help our clients focus on due diligence processes to ensure they are not violating others' intellectual property rights. We will work with our clients to make them even more vigilant when it comes to protecting their intellectual property and avoiding infringement of others' intellectual property. We have always been focused on these issues, but intellectual property issues will be something we stress even more in this atmosphere. Regardless of which, if any of the proposed legislation is passed into law in these areas, we will need to make sure we are keeping our clients abreast of the changes and make sure we are advising them appropriately.

Records Retention

Due in large part to new laws and to discovery issues in litigation, including the growing use of electronic discovery, many of our clients have developed, or are in the process of developing, thorough records retention policies. For instance, we have been working with a large company for almost a year to complete the analysis and policy development required to have an effective records retention policy. These policies describe the different types and categories of records, provide for the lengths of time various records are to be retained, as well as where and in what form they are to be retained, and provide for specific manners and times for their destruction. These policies also set forth procedures to be implemented in the event of litigation holds, disaster recovery efforts, etc. However, with our clients' growing use of outside service providers, we saw a gap between what our clients were themselves doing in the area of records retention and the obligations service providers had towards our clients' information and records. All of our clients' service agreements contain confidentiality clauses, which provide for the confidential treatment and return or destruction of our clients' confidential information. However, many of these service agreements were inconsistent with the requirements of our clients' records retention policies, or in some cases provide only that the service provider would abide by our clients' directions regarding information and records. In response, we have encouraged our clients to begin putting provisions in their service agreements to ensure that the service providers are retaining, handling and destroying records in accordance with our clients' records retention policies, and are obligated to follow our clients' instructions with respect to the retention, handling, and destruction of records.

We are making a more concerted effort to encourage and assist our clients in the area of data management and records retention. With the increase in the number of privacy laws in force or under consideration, we believe it is imperative that our clients have an understanding of the types of data in their possession, the laws that apply to such data, and the policies and procedures that need to be put into place to ensure compliance. A sample records retention policy provision for a services agreement follows:

1. The parties acknowledge that in connection with this Agreement, Vendor may have access to, generate and/or receive certain records related to Client and/or the Services. For purposes of this Section, a "record" is any information and/or document(s), in any form (e.g. electronic, hardcopy, etc.), that is required to be kept pursuant to the Client's Records Management Policy

("Retention Policy"), or other Client corporate policy provided to the Vendor, as evidence of the transaction of business and/or as mandated by laws applicable to Client.

2. Client shall provide Vendor with the Retention Policy in effect as of the date of this Agreement, and as amended from time to time, for the records related to this Agreement. Vendor shall comply with all requirements of the Retention Policy, and other Client corporate policies, including, without limitation, the retention period and destruction requirements.

3. Upon written direction from Client due to evidentiary, regulatory or other reasons, Vendor shall remove from the destruction cycle (and not destroy) records otherwise scheduled for destruction in accordance with Client policies. Upon and only upon further written direction from Client, Vendor shall, in accordance with Client destruction standards, destroy such removed records. Vendor shall also promptly comply with records search requests from Client and provide copies of any records to Client upon its reasonable request.

Intellectual Property Protection and Enforcement

Because of the heightened awareness and enforcement atmosphere surrounding intellectual property, our clients will face increasing hurdles in the area of intellectual property protection and enforcement. This is an area we have focused on for many years, but it is growing increasingly important and complex, as new laws are passed on an international, federal, state and even local level, and clients must continually be reminded of its importance. Our clients will need to be aware of the maze of laws facing them in the various jurisdictions where they conduct business, and the policies and procedures they will need to have in place to comply with these laws. In order to proactively prepare, the first step is for our clients to audit and understand the data and intellectual property (both their own and others') held and used within their organizations. This is typically accomplished through an intellectual property audit, and most of our clients end up quite surprised at the wide array of data and intellectual property they either own or have in their possession. Once the audit is completed, we can work with the clients to define the legal landscape applicable to such data and intellectual property, and to develop the policies and procedures necessary to protect their own data and intellectual property, and to not inadvertently violate the rights of others.

Future Focuses

For several years our firm has been focused on globalization. As a Detroit-based firm, we are in a unique position to work with many global companies and large research universities based in our region, as well as non-US companies that conduct business in our region. These representations typically involve not only our intellectual property lawyers, but also our business, employment, real estate and banking lawyers. Our firm is more frequently working with European and Asian companies conducting business in our region to guide them through the U.S. legal landscape and represent their interests here in the U.S.

Our firm also is focused on a more comprehensive approach in the area of data management and

protection. We have brought together attorneys from a number of legal disciplines, *e.g.*, litigation, business, health care, banking, etc., to work with our clients on all aspects of data management and protection. We will continue this comprehensive approach to help our clients to audit and understand the data and intellectual property held and used within their organizations, and to develop the policies and procedures necessary to protect that data, and to avoid violating the rights of others.

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