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CTEA Doesn't Violate Copyright Clause or First Amendment, Supreme Court Rules

By a wide (7-2) majority, the U.S. Supreme Court Wed. upheld the Sonny Bono Copyright Term Extension Act (CTEA) against claims that it violated both the Copyright Clause and the First Amendment of the Constitution. In a sign some CTEA foes deemed particularly depressing, the liberal-leaning Justice Ruth Ginsburg wrote the opinion of the court in *Eldred v. Ashcroft*. In strong dissents, Justices Stephen Breyer and John Stevens called the controversial law unconstitutional. Reaction to the ruling, not surprisingly, was mixed, with some questioning the wisdom — if not the constitutionality — of the CTEA.

Eldred and the other petitioners offer products or services based on copyrighted works by others that have entered the public domain. They challenged the CTEA — which extends copyright protection to 70 years after a creator's death and which applied to existing as well as future works — on 2 grounds: (1) That in enacting the law, Congress exceeded the bounds of its authority by extending term protection to existing works — granting, in effect, perpetual copyright protection. (2) That the act regulated speech but flunked the strict scrutiny test for such regulations.

The majority rejected both arguments, affirming rulings by both the district court and the U.S. Appeals Court, D.C. The Copyright Clause reads: "Congress shall have Power... [t]o promote the Progress of Science... by securing [to Authors] for limited Times... the exclusive Right to their... Writings." Contrary to Eldred's argument, Ginsburg wrote, that doesn't mean that a copyright term, once set, becomes unchangeable. Through the years, the court said, Congress has "regularly applied duration extensions" to both future and existing copyrights.

Moreover, the court said, it will "defer substantially" to Congress on the question of whether that body has the authority to alter the copyright protection term: "The CTEA reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the Legislature's domain." Congress had several reasons for enacting the CTEA, the court said, including bringing the U.S. in line with European Union laws and encouraging copyright owners to invest in the restoration and public distribution of their works. "[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be."

The majority found the petitioners' "novel arguments" unconvincing. Eldred argued that even if the CTEA's 20-year extension were a "limited time" under the Copyright Clause, allowing Congress to extend existing copyrights amounted to creating perpetual copyrights. The

court disagreed, saying petitioners had failed to show how the CTEA “crosses a constitutionally significant threshold” with respect to limited times that earlier copyright extensions didn’t. The court found no validity in claims that the CTEA hampered originality, failed to promote the progress of science and ignored the quid pro quo of copyright (that is, that a creator received a limited exclusive right in exchange for dedicating the work to the public afterward). The bargain actually entails giving copyright owners not only protection for the time in place when protection is granted, the court said, but also for any renewal or extension given thereafter.

Finally, the majority rejected “petitioners’ plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards.” The fact that the Copyright Clause and the First Amendment were adopted close in time indicates, Ginsburg wrote, that in the Framers’ view, “copyright’s limited monopolies are compatible with free speech principles.” In fact, the court said, the whole point of copyright protection is to promote the creation and publication of free speech.

Under Eldred’s vision of the Copyright Clause, the court said, not only would the CTEA’s term extension be unconstitutional as to existing works, it would invalidate protections for future creations. “Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA’s long terms,” Ginsburg wrote. “The wisdom of Congress’ action, however, is not within our province to second-guess.”

The Dissent

The majority’s conclusion “rests on the mistaken premise that this court has virtually no role in reviewing congressional grants of monopoly to authors, inventors and their successors,” Stevens thundered. Retroactively extending term protection neither encourages new inventions nor advances progress by adding knowledge to the public domain, he wrote. Rather, he said, it frustrates the “legitimate expectations of members of the public who want to make use of [a work] in a free market.”

The court shouldn’t be too quick to rely on Congress’s original creation of the copyright system to support the argument that Congress understood it had the constitutional authority to extend existing copyrights, Stevens said. Just because Congress historically has extended both patents and copyrights doesn’t mean those actions were proper, he said. That history is “replete with actions that were unquestionably unconstitutional.”

By failing to safeguard the public interest in free access to creative material, Stevens said — “indeed, by virtually ignoring the central purpose of the Copyright/Patent Clause” — the court has “quitclaimed to Congress its principal responsibility in this area of the law.” It’s not “hyperbole,” he said, to “recall the trenchant words of Chief Justice John Marshall: ‘It is emphatically the province and duty of the judicial department to say what the law is.’”

The CTEA is “likely [to] cause serious expression-related harm,” Breyer wrote. It’s likely to restrict traditional dissemination of copyrighted works, hamper new forms of publication through the use of new technology and interfere with efforts to preserve the U.S.’s cultural and historical heritage, he said. While the CTEA might benefit the private financial interests of existing copyright owners or their heirs, he said, “I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public.”

Range of Reaction

Reaction to the high court ruling surfaced even before the decision was posted. Not surprisingly, given the polarization of views in that area, proponents of strong copyright protections praised the decision, while those who favored greater public access to copyrighted works assailed it. Some took a middle ground, saying the CTEA might be legal but it didn’t amount to good policy.

Most copyright lawyers viewed *Eldred* as “a pretty easy case” as it moved through the trial and appellate courts, said Steven Englund, a copyright attorney. “We were surprised,” he said, when the Supreme Court took the case, he said, but its decision is entirely consistent with those of the lower courts. *Eldred* is an important ruling for proprietors of a relatively small number of older movie and musical works, Englund said, but there’s not much trade in works from the 1920s. He said he was “most worried” that if the Supreme Court bought Eldred’s argument that copyright duration should be forever set at the time the work was fixed, then no other terms of protection could be extended. If that had become the law, he said, “it would be a disaster” for anyone trying to engage in commerce involving copyrighted works.

Rep. Conyers (D-Mich.) said he wasn’t surprised the court “upheld the prerogative of Congress to promote and protect authorship.” The decision, he said, shows this country’s commitment to encouraging creativity and

free expression. The Assn. of American Publishers (AAP), which took no position on enactment of the CTEA because of “member disagreements over the desirability of term extensions as a matter of public policy,” said it “never doubted” Congress’s authority to set such limits. AAP praised the court for “strongly reaffirming” its long-standing view that the copyright term promoted creation and free speech. MPAA Pres. Jack Valenti also applauded the ruling, calling it a victory not only for rights holders but for consumers.

A Call to Arms

That’s not how consumer groups saw it. “Obviously, we prefer Justice Breyer’s dissent to the majority opinion,” said Electronic Frontier Foundation staff attorney Wendy Seltzer. The best that can be said about the opinion is that it underscores the importance of fair-use rights, she said. If copyright won’t be limited in duration, then there’s a critical need to reinforce the built-in protections for public access and use, she said.

The decision also adds to the value of efforts to “creatively rethink copyright” and allow authors to opt out of the whole system, Seltzer told us. Legislation floated by Reps. Boucher (D-Va.) and Doolittle (R-Cal.) that would allow a user to circumvent copy protection devices if making fair use of a work assumed even greater importance after *Eldred*, she said. The decision will spur “vigorous fighting in the courts” over consumer fair-use rights, she said.

The Consumer Electronics Assn. (CEA) sharply criticized the ruling, saying it was “unfair that companies who made their fortune taking works in the public domain and reformatting them for new technology are now preventing others from following the same business model. Congress took from the public and gave to Disney.” CEA urged Congress to revisit the extensions and “return reasonable limits to the copyright term.”

The ruling is “bad for consumers, bad for innovation and ultimately bad for America,” Digitalconsumer.org said. *Eldred* should be a “call to action” for those who care about innovation and public access to creative works, the group said: “Public pressure should now turn to having our elected officials legislate a more equitable balance between copyright holders and consumers as the courts have said clearly that they will not intervene in this debate.”

Another intellectual property attorney took a different tack. The decision shouldn’t be read to mean that copyright extensions are wise, George Wheeler said. Even before the CTEA came along, he said, copyright terms were “already generous.” If the purpose of the law was to motivate potential authors and composers to publish works secure in the knowledge that someone wasn’t going to rip them off, Wheeler said, it wouldn’t work, because lengthening the term wouldn’t create any additional incentive. The real force behind the CTEA was large corporations that acquired works from creators, he said. Making the works more valuable to those companies won’t encourage people to create more, he said, because the real incentive is what one can make from a work in its first few years. — *Dugie Standeford*

Privacy, ICANN Reform on Agenda

Burns Confident Spam Legislation Will Be on Floor by Summer

Senate Communications Subcommittee Chmn. Burns (R-Mont.) unveiled what he admitted was an ambitious technology agenda Wed. that featured antispam legislation. The “NexGenTen” agenda highlights spam as the top priority, but also includes: ICANN reform, online privacy, tax incentives for broadband build-out, digital democracy, the development of U.S.-Asia free trade network.

Other NexGenTen issues include: spectrum reform, wireless privacy, E-911 deployment and reform of the universal service fund. “We can pass some of this agenda,” said Burns, who acknowledged passage of all the items would be difficult: “If we don’t offer something, we’ll get none of it through.”

Burns said he expected the spam bill to receive the support of the committee and that it should be on the Senate floor before the summer. He told reporters in the Senate Commerce Committee’s hearing room that he again would work with Rep. Wilson (R-N.M.) to usher through a bill that would require easy opt-out options for consumers and impose “harsh” penalties on senders who falsified information about the origin of the e-mail. Burns will re-introduce the CAN-SPAM (Controlling the Assault of Nonsolicited Pornography & Marketing) bill (S-630) he co-sponsored with Sen. Wyden (D-Ore.) that was approved unanimously by the Commerce Committee last May.

The first element of the agenda was introduced Tues., when Burns offered a bill (S-160) with Senate Finance Committee ranking Democrat Baucus (Mont.) that would allow companies to classify broadband construction as a capital expenditure. He said Tues. on the Senate floor that S-160 “generally mirrors” legislation (S-88) by Sen. Rockefeller (D-W.Va.) in the 107th Congress, which was based on legislation by then-Sen. Moynihan (D-N.Y.) in the 106th Congress. But instead of using tax credits as a means of foster investment, as the previous bills did, Burns said changes in expensing provisions would do a better job of motivating investment in a down economy.

In Burns’ bill, anyone building out broadband in rural or underserved areas would receive one of 2 tax breaks: (1) If deploying current broadband technology such as DSL or cable modem, they could immediately expense 50% of the capital expenditure. (2) If they deployed “next-generation” broadband, defined in the bill as at least 22 Mbps downstream and 5 Mbps upstream, the company could expense 100%. Burns said it was technology-neutral and would sunset in 5 years. He pointed to a 2-year broadband tax credit that Mont. launched in 1999, saying “it had very positive effects.” But he said it had been suspended “because of the current budget shortfall which the state is facing, which is exactly why we should consider a federal broadband incentive at this time” when Congress was taking up economic stimulus legislation. Baucus made the same argument.

Senate Judiciary Committee Chmn. Hatch (R-Utah) supported the bill, highlighting that providers would “only receive the benefit of this incentive if they actually build new infrastructure and actually provide service.” He said he looked forward “to taking a leading role in helping this bill move through the Finance Committee,” on which he serves. The bill had 7 original co-sponsors.

Burns said he would be meeting with ICANN officials to discuss how that quasi-govt. body could be restructured to make it “more viable.” He said that issue “demands immediate oversight” and said he would hold a hearing in the spring that would address potential legislation to authorize ICANN’s existence. He said ICANN had made “half-hearted efforts at internal reform” and said its lack of accountability posed “serious problems for American national security.” He highlighted his concerns by citing the Oct. denial-of-service attack that brought down 9 of the 13 root servers. Burns also said he was troubled by constitutional issues, including whether the Commerce Dept. violated the “nondelegation” clause by granting “such a huge responsibility to ICANN in the first place.”

Burns said he again would support the online privacy bill he co-sponsored with then-Senate Commerce Committee Chmn. Hollings (D-S.C.) The bill, which passed the committee last year, adopts a 2-tier approach: (1) Sensitive personal information, such as medical and financial data, would be protected through opt-in standards. (2) General information, such as e-mail addresses, would be under an opt-in platform.

The U.S.-Asia Network is designed to promote free trade and “make sure that American technology products can compete on a level playing field in foreign markets,” Burns said. The agenda will include a “technology neutrality initiative” to address the problem of national govt. favoritism for domestic technologies. “A multilateral process will eliminate government policies that impair international commerce and reduce consumer choice,” Burns said. He said the agenda would include “a coordinated effort to make the legislative process available to citizens over the Internet through cybercasts and online documents.”

Burns laid out the following timeline for NexGenTen: (1) Spam, spectrum reform and E-911 were “current projects.” (2) ICANN reform, wireless and online privacy would be addressed in the spring. (3) Broadband expensing, universal service reform and the U.S.-Asia network would be part on the summer agenda. (4) Digital democracy would be addressed in the fall. — *Terry Lane, Patrick Ross*

Broadband Key

Hill to Be Lobbied More Aggressively on Tech by Local Govts.

Local govts and their national associations are holding a briefing for staffs of the Senate and House Commerce Committees Jan. 17 as part of an effort to commit more resources and leaders to counter telecom industry lobbying and to push what they call “proactive public policy agenda” on the Hill. The local govts. formed the TeleCommUnity Alliance, which will focus solely on their agenda on Capitol Hill.

Montgomery County (Md.) Councilwoman Marilyn Praisner, chmn. of the TeleCommUnity Alliance and member of the FCC’s Local & State Govt. Advisory Committee, will lead the Jan. 17 local govt. briefing. The group is staffed in Washington by law firms Miller & Van Eaton and Bracy Tucker Brown. Besides the National

Assn. of Telecom Officers & Advisors, alliance members include more than 100 cities in Ariz., Md., Mich., Tex. and Va., the group said.

The local govt. agenda on the Hill will be driven by 3 core issues, said attorney Nicholas Miller, who represents local govts.: (1) Rights-of-way management and compensation issues for both cable and telephone. (2) Cable modem and broadband deployment and regulation. (3) Spectrum allocation for government purposes. Miller said “we have a bunch of legislative ideas but as to when and how they would be floated would be in consultation with the national associations.” The decision also will be driven by the agenda emerging on the Hill, he said.

As for broadband, Miller said the Tues. Senate Commerce Committee hearing (WID Jan 15 p3) indicated there was “anything but a consensus as to what to do about broadband legislation and that the action is going to be at the FCC in the first 6 months” of the year. “So whether in fact we will drop a [broadband] bill or not is going to be a tactical decision that will be made in the next month or so,” he said. Local govts. had been toying with specific legislation last year in response to Tauzin-Dingell, Breaux-Nickles and McCain bills, but “we didn’t put it into the hopper because it became clear by early fall that nothing was going to pass,” Miller said.

Alliance officials already have met with staff of incoming Senate Commerce Communications Subcommittee Chmn. Burns (R-Mont.), and the theme of the Fri. meeting will be the “need to fight preemption in general and the need to protect rights-of-way specifically,” a spokesman said. Several telecom and Internet groups have called for federal legislation to override rights-of-way to permit faster broadband deployment. The group was drafting proposed legislation to place “local governments on the offensive when it comes to rights-of-way management and the recovery of reasonable rent of the use of such assets,” he said. The group said it was time for local govts. to stop playing “catch up” under rules set by industry, and instead of spending “limited resources in piecemeal defenses, TeleCommUnity intends to help local governments to consolidate their common interests.”

“It is really an effort to give some serious lobbying and public relations support for the local government communications agenda on Capitol Hill,” Miller said. Cities joining the alliance are committing elected officials as speakers and witnesses and are putting “serious money” into pushing their agenda, he said. Asked if it was the first time that such a concerted effort was being made on the Hill, Miller said problem with local govts. in past was that even though mayors had clout with members of Congress, technology issues weren’t high enough on the agenda. Also, local govts. were outnumbered by industry in terms of lobbyists they deployed on the Hill, he said. For instance, he said, the League of Cities had 4 lobbyists, only one of whom spent just 1/3 of the time on communications issues: “That’s not a fair fight when contending with an industry that sends as many lobbyists to Capitol Hill as they do.” — *Dinesh Kumar*

‘Clear and Obvious Breaches’

Canadian Judge Warns About Material on U.S. Web Sites

Amid allegations U.S. media had breached a court-ordered publication ban by posting news on the Internet, British Columbia Provincial Court Judge David Stone warned Wed. that reporters covering the case of the man accused of being Canada’s worst serial killer should honor the ban. The judge said more measures could be taken if the ban wasn’t observed. He also extended the publication ban explicitly to cover the Internet, where some U.S. media outlets had posted stories on the evidence.

The judge’s order, posted on the courtroom door, spelled out the terms of the ban as “including any submissions, representations or rulings respecting evidence or the nature of the evidence taken at the preliminary hearing of Robert William Pickton. This ban extends to any publication in any newspaper, on the Internet or broadcast by any means.” Those disobeying the order would be guilty of an indictable offense under the country’s Criminal Code and liable to imprisonment for up to 2 years, the order said.

Judge Stone had adjourned the preliminary hearing Tues. afternoon after lead defense lawyer Peter Ritchie filed an affidavit to the court with copies of articles, broadcasts and Internet sites he said were examples of “clear and obvious breaches of the ban on publication” that didn’t extend into the U.S. “Both Canadian and foreign media, specifically American media, are ignoring the ban on publication. We have been in touch with the RCMP,” he said, and the breach “may reach a degree of significance that [a fair trial] becomes unattainable.”

The joint Vancouver Police-Royal Canadian Mounted Police Women’s Task Force issued a statement Tues. confirming police were investigating possible violations of the ban: “At this time, the task force is and will con-

tinue to monitor international media, and any breaches of the publication ban ordered by Judge David Stone,” the statement said: “The joint task force will reach a decision on how the publication breaches will be dealt with in consultation with Crown counsel.”

Another Pickton lawyer, Adrian Brooks, explained outside the courthouse that the ban was violated because some Canadian media were effectively pointing readers to U.S. Web sites where information on the trial could be obtained, and quoting individuals who said they intended to follow the hearing on the Internet. He said the defense team was organizing someone to monitor all news reports on the case. “We want to make sure that the atmosphere remains as clear as possible and that, during a preliminary hearing, when only one side of the story is being told, that story not be one that affects jurors,” he said. “The concerns are always of a fair trial.”

Crown prosecutor Michael Petrie also told the court he was aware that U.S. media might violate the publication ban: “Unfortunately, some of the fears we had... have proved themselves out.” When Petrie raised the idea of banning U.S. reporters, Judge Stone responded: “If the American media does not live up to the spirit of the ban and continues [today], that would be more material to be brought to my attention and I will deal with it accordingly.”

Ritchie had also suggested to Judge Stone that U.S. reporters could be barred from the courtroom, or contempt-of-court or criminal charges could be laid against reporters and media organizations, or that the ban could be clarified. Judge Stone rejected the suggestions for contempt-of-court charges or Criminal Code charges, but didn’t rule out barring reporters or clarifying the ban. He said he wouldn’t follow Ritchie’s request that the hearing be closed to the public.

Ritchie had refused to name specific newsrooms but said he was concerned about reports by an Associated Press (AP) correspondent, Canadian freelancer Jeremy Hainsworth, who has been covering the hearings. He said within an hour of Ritchie’s appearance that a member of his staff had accessed material on the Internet that included “clear and obvious breaches of the ban on publication.”

AP spokesman David Tomlin said in an interview that the news service was acting properly because stories on the case weren’t being transmitted to The Canadian Press, the news operation’s distributor in Canada. He said all Pickton-related copy was being flagged with a note to editors on the ban: “All other transmissions were accompanied by an editor’s note calling attention to the publication ban. On the advice of counsel familiar with Canadian criminal procedure, we believe these steps are sufficient and we took them in good faith. We believe we have done our best to avoid a confrontation with the court. Our intention was to comply with the order banning publication in the Vancouver area.”

Material published on the Web site of *The Seattle Times* also referred to evidence the Crown began presenting in court when hearings began Mon. Alex MacLeod, the paper’s managing editor, said in an interview that posting information on a Web site was not the same as publishing information in a newspaper that was actively circulated to readers: “What we are doing is making information available to people anywhere in the world if they know about our Web site. They have to come to us, and I think that’s a fundamental difference.”

Reports on the case on Seattle TV stations so far have been blocked for Canadian viewers by Canadian provider Shaw Cable. The cable company has told viewers in a full-screen notice that it was required by Canadian law “to black out any news story that may contain possible evidence in the Robert Pickton murder trial.”

Concerns over the publication ban are expected to be resolved over the next several days. Pickton, a 53-year-old Port Coquitlam, B.C. pig farmer, is accused of being Canada’s most prolific serial killer. Since last Feb., he has been charged with 15 counts of first-degree murder in the deaths of women who disappeared from Vancouver’s Downtown Eastside. The list of missing women now stands at 63.

Several American reporters said they intended to have lawyers representing them, as did some Canadian news outlets. — *Carla Pasternak*

Berman Ready to Act

Consumer Groups Skeptical of RIAA-Tech Policy Accord

The absence of consumer groups from the online content policy agreement Tues. by RIAA, Business Software Alliance (BSA) and the Computer Systems Policy Project (CSPP) (WID Jan 15 p1) was a sore spot for many Wed.

Both RIAA Pres. Hilary Rosen and BSA Pres. Robert Holleyman said Tues. that their member companies had consumer interests in mind because they wanted to sell more goods, but that wasn't enough for Rep. Lofgren (D-Cal.). While praising the groups for recognizing that technology mandates such as those proposed last year by then-Senate Commerce Committee Chmn. Hollings (D-S.C.) "are now dead," she said: "However, it also appears that the parties to the agreement did not involve consumer or fair-use advocates. Without providing for the legal rights of consumers, any such agreement falls short and omits an essential concerned group — the consumers themselves."

Lofgren last fall introduced a bill to allow consumers to evade copy-protection mechanisms if practicing fair use, a bill she said she intended to reintroduce in this Congress "soon." Like the bill by House Internet Caucus Co-Chmn. Boucher (D-Va.), Lofgren's would be opposed in the new accord because it stated that "consumer expectations" (which Rosen equated with fair use) are met by "a business decision that should be driven by the dynamics of the marketplace, and should not be legislated or regulated." Both the Boucher and Lofgren bills would rewrite Digital Millennium Copyright Act, something RIAA and BSA — both protectors of intellectual property — oppose.

"[A] bill like Congressman Boucher's is absolutely necessary," Consumers Union Legislative Counsel Chris Murray said, because the accord reached by RIAA, BSA and CSPP is so "well lawyered." He gave as one example the fact that manufacturers of products (such as CDs) that were copy-protected "should endeavor to clearly inform consumers of the playability" on different systems. "It's extremely disappointing that they couldn't even agree as a matter of principle that product labeling should give consumers all the information they deserve," Murray said.

"There ain't much there" in the agreement, Consumer Federation of America (CFA) Research Dir. Mark Cooper said: "What's bothersome is if you look at the language [of the agreement], they never mention consumers." Instead, he said, the agreement addressed consumers only through "education campaigns, finger-wagging and storm troops." Consumer groups "want to get back some of their fair-use rights," he said, and are calling for Congress "to eliminate some of the more egregious offenses of the DMCA." Despite Rosen's repeated insistence Tues. that record labels were aggressively making content available online, Cooper insisted "they don't have a business model."

Digital Media Assn. Exec. Dir. Jonathan Potter said his group looked "forward to the continuing development of competitive consumer offerings that supplant piracy in the marketplace by offering quality music at a fair price." He said he was pleased RIAA had "repudiated government-imposed technological mandates as anti-consumer, anti-innovation and unproductive." Murray also was pleased, but said: "I don't think such measures were going anywhere in the first place due to the huge consumer backlash such legislation generated."

Other than Boucher and Lofgren, reaction to the agreement on the Hill was mostly favorable. House Judiciary Courts, Internet & Intellectual Property ranking Democrat Berman (Cal.) said "copyright and technology creators have a symbiotic relationship, and [I] have lamented the growing rift between the 2 communities." Berman last year introduced a bill that would have permitted content owners to perform "self-help" techniques to interfere with piracy on peer-to-peer networks. The agreement supports such measures as long as they aren't destructive to networks, individual users' data or equipment and don't violate individuals' legal rights to privacy. Berman said if the 3 groups "conclude legislative action is necessary to advance the interests of copyright and technology creators as well as the American consumer, I will be very interested in helping them take that action."

House Internet Caucus Co-Chmn. Goodlatte (R-Va.) agreed with Berman that "technology companies and content providers need each other." Goodlatte is a crusader against Internet piracy, and he said he hoped this collaboration would lead to "greater strides in combating rampant digital copyright piracy." Sen. Leahy (D-Vt.), who last year as chairman of the Senate Judiciary Committee vowed Hollings' bill would not pass Congress, praised the agreement as well. Leahy also said both industries relied on intellectual property: "They need to work together, not at cross-purposes." — *Patrick Ross*

Capitol Hill

A bill to create more unlicensed spectrum for broadband was introduced Tues. by Sens. Boxer (D-Cal.) and Allen (R-Va.), as expected (WID Jan 15 p3). S-159 largely reflects the bill they introduced late in the 107th Congress, calling for 255 MHz of additional unlicensed spectrum. However, Boxer said that to address concerns of the cellular community, the spectrum would be limited to the 5 GHz band. The previous bill called for allocation

below 6 GHz, which concerned cellular operators below 3 GHz. Allen said the 5 GHz designation would “harmonize wireless devices in the United States with the international allocation in countries like Japan, Brazil, Canada and Europe,” adding that band had favorable propagation. The band limitation is significant in that Boxer and Allen both said one aim of the bill was to promote Wi-Fi, but what most people consider Wi-Fi, 802.11b, operates at 2.4 GHz. A faster wireless LAN service, 802.11a, operates at 5 GHz but is used primarily by businesses. Boxer said the bill also was modified to limit any FCC rules to “ensure robust and efficient use of the spectrum for broadband delivery services.” Both Boxer and Allen touted wireless Internet as a way to speed broadband rollout, with Boxer saying that in rural areas, “wireless technologies have the potential to allow communities to use signal repeaters to bring Internet connections to places where wires do not reach, or where the signal over the wire is too weak.” But Allen said Wi-Fi “is only the beginning and this legislation will create an environment where cognitive radios and dynamic frequency selection of technologies can grow and innovate to offer services unimaginable today.” The bill would give NTIA 180 days to consult with agencies such as the Dept. of Defense on interference standards, and the FCC would have 360 days to adopt “minimal technical and device rules” for the unlicensed spectrum. It was referred to the Senate Commerce Committee. — *PR*

Incoming Senate Small Business Committee Chmn. Snowe (R-Me.) introduced Tues. a bill (S-158) to increase expensing for small business. She pointed out her bill “embodies a leading provision of the President’s economic recovery package.” Under her legislation, which was referred to the Senate Finance Committee, the expensing limit for capital purchases would be tripled to \$75,000. Several high-tech associations have made such a provision one of their leading priorities for the stimulus package. Sen. Bond (R-Mo.) co-sponsored the legislation.

Sen. Feinstein (D-Cal.) reintroduced a bill to crack down on identity theft. S-153 is similar to the one she offered last June in the 107th Congress. It would create new crimes and tougher sentencing for identity theft. Most such theft still occurs offline, but statistics suggest the Internet is a growing tool for identity theft.

The Office of Management & Budget needs to stop holding up the implementation of a broadband loan program that was included in the farm bill last year, 6 senators wrote OMB Dir. Mitchell Daniels Tues. Sens. Harkin (D-Ia.), Burns (R-Mont.), Dorgan (D-N.D.), Clinton (D-N.Y.), Baucus (D-Mont.) and Daschle (D-S.D.) said the program, “designed to make hundreds of millions of dollars of low-interest direct financing available to encourage investment in broadband infrastructure in high-cost, low-density areas” was due to begin under the Dept. of Agriculture’s Rural Utilities Service (RUS) within 6 months of enactment. “That deadline has passed and we understand that the draft regulation remains at [OMB].” The senators urged quick action on the regulations while calling for OMB to “assign a subsidy rate that is consistent with the 50-year history of the RUS telecommunications program, to be technology and provider neutral and to give the agency with this expertise the regulatory flexibility it needs to get the job done.”

Agencies

The FTC holds a news conference today (Thurs.) to announce action taken against the deceptive online marketing of international drivers’ permits. Speakers include Howard Beales, dir., FTC Bureau of Consumer Protection, and a representative of the American Automobile Assn. — 202-326-2161.

FCC Office of Engineering & Technology Chief Edmond Thomas said Wed. at a special agenda meeting that the agency’s lab would examine spurious emissions from power line communications this year to assess interference potential to other services, such as TV. Several commissioners expressed interest in the idea of using power-line communications as a 3rd path into homes to provide broadband services, competing with DSL and cable. That technology delivers high-speed data transmissions and broadband communications across a utility’s medium- and low-voltage distribution systems. The technology is being tested in the U.S. under several experimental licenses. The point of lab research would be to assess potential interference from spurious emissions in both the outdoor environment of transmission lines and the environment of in-home wiring, Thomas said. The Power Line Communications Assn. (PLCA) told the FCC in a filing last year that the technology could be deployed under existing Part 15 rules, with limited changes to expand flexibility in network design, increased throughput and extended service reach in rural markets. Of the ability of the technology to operate under the existing Part 15 regime that covers unlicensed spectrum, Thomas told us after the meeting: “We’re not quite sure that that’s right and we’re looking at that.” The FCC is likely to seek comment on the issue after preliminary research is done, he said. FCC could move forward in that area with a notice of proposed rulemaking or a notice of inquiry, Thomas said. That decision hasn’t been made yet and would depend on the results of the Commission’s findings, he said. “If

there's a significant problem, then obviously we've got to move very rapidly," he said: "If there isn't, we may conclude that the Commission's rules are good enough." The FCC Lab is likely to examine both prototypes and existing equipment with an eye toward not having to examine each individual configuration of the technology when it starts operating in a particular area, he said. "What you have to do is become confident enough that you have prescribed test procedures that are indicative of general uses," Thomas said. PLCA Pres. Alan Shark said the Commission had expressed significant interest in the potential for powerline communications to compete with DSL and cable. He said his industry wasn't convinced that new rules needed to be written to allow that technology to be deployed, but said he understood that the Commission felt a need to conduct testing to make sure that existing rules covered the new technology. In about a week, Shark said his group would make a filing at the FCC on the issue. He said that among the aspects of the technology that were appealing to the FCC were: (1) Its ability to bring broadband into homes wired for electricity, which greatly expands the reach of other broadband connections. (2) Internal uses for utilities to be able to monitor the security of the electric power grid more closely. (3) Ability of local public safety agencies to have back-up data communications if their primary system went down.

— *MG*

Revised national security export controls for microprocessors used in mass market cellphones, wireless base stations, personal computers and digital assistants went into effect Tues. (Jan. 14). The final rule implements changes in the list of dual-use technologies maintained by govts., participating in the Wassenaar Arrangement, the Commerce January 15, 2003, dept.'s Bureau of Industry & Security (BIS) said. The removal of export licensing requirements for general purpose microprocessors has become increasingly necessary in light of "the continuous, rapid increase in microprocessor capabilities" and the incremental modifications needed to keep pace with those changes, BIS said. Those frequent efforts had been deemed necessary "to avoid expending limited export control resources on mass market items," it said. Existing restrictions on exports and reexports of microprocessors capable of 6,500 million theoretical operations per second — MTOPS — to terrorist-designated nations remain in effect. BIS inserted a new section in the export rules that clarified restrictions and licensing requirements for technologies with military uses. The Commerce Dept. said the new regulation was "necessary to ensure that U.S. industry can compete on a level playing field in the growing international market for microprocessors, while protecting vital U.S. national security interests."

Corporate expatriates should "come home" and pay their fair share of taxes rather than remain relocated outside of the country, Sen. Dayton (D-Minn.) said on the Senate floor Tues. "Don't break America with your selfishness or your greed," he said. Dayton vowed to revitalize support for efforts begun in last Congress that came close to preventing such companies from competing for Dept. of Defense (DoD) and the Dept. of Homeland Security (DHS) contracts. Dayton last week introduced legislation that would set up roadblocks to DHS contracts for companies that moved their base operations to offshore tax-free havens. He introduced the bill in memory of the late Sen. Wellstone (D-Minn.), who last year amended the DoD FY 2003 appropriations bill and the DHS Act. The Wellstone measure didn't make it into the final version of the DoD bill and was "gutted" before being included in the DHS bill, Dayton said: "Whereas [Wellstone's] amendment permitted only the President to grant a waiver" of the contract restrictions, "the corporate callboys snuck in language that allowed the Secretary of Homeland Security to grant waivers for national security or for economic benefits." The Dayton bill would restore the Wellstone amendment to the DHS Act.

Courts

U.S. Dist. Judge Lawrence Kahn, Albany, N.Y., promised a ruling soon on Madster's bid to take enforcement of a preliminary injunction against the filing-sharing service away from the Chicago court that held the company in contempt, the RIAA said. Kahn said he wouldn't disturb the order or other previous actions of U.S. Dist. Judge Marvin Aspen, Chicago. Madster, formerly Aimster, contends Aspen and record company plaintiffs overstepped bounds in the copyright infringement action set by the Bankruptcy Court hearing Madster's Chapter 11 reorganization in Albany.

Privacy

Threats to privacy rights gradually multiplied over the last few decades, but "parallel developments" in technology, law and politics since Sept. 11, 2001, are most responsible for accelerating the growth of the nation's "surveillance monster," the ACLU said in a report released Wed. The pervasiveness of products such as computers, cameras, sensors and wireless communications, combined with more recent advances in face-recognition and

data-mining technologies, have removed “technical barriers to the Big Brother regime portrayed by George Orwell,” it said. But rather than implementing stronger restraints, society is “weakening the legal chains” required to protect privacy. Govt. surveillance and the “commodification of personal information by corporations” are equally contributors to the surveillance monster’s growth, the ACLU said: “The distinction between government and private-sector privacy invasions is fading quickly.”

Security

Wireless networks remain insecure despite technology advances, and new approaches are needed to deal with attackers whose motivations and capabilities are continuing to grow, Cable & Wireless security architect Shannon Myers said Wed. Security “seems to be everybody’s problem and nobody wants to take any responsibility for it,” she told a Wireless Communications Assn. symposium in San Jose. Vulnerabilities aren’t new but they were pushed to the fore by Wi-Fi, which means “everybody’s got access now,” Myers said. She said in the arms war between security and attackers, the attackers had the upper hand. The industry has incentives to push wireless to as many customers — and for as many purposes — as possible, and lacks short-run motivation to incur the burdens of security development and make access less convenient for customers, Myers said. Even new security protocols touted as much more robust are based on old methodologies, she said. Hackers recognize the similarities and can break new technologies even before they hit the market. That occurred, for example, with OFDM (orthogonal frequency-division multiplexing), Myers said. Also, host-based intrusion-detection systems are hot, but they are just marketers’ repackaging of firewalls, and no less breakable, she said. Meanwhile, a tough economy means more people than ever have economic motivations to crack network security, attackers’ sophistication is growing and hacking instruction is readily accessible online even to the unsophisticated, Myers said. ISPs should insist vendors provide more secure gear, and security should be layered on hardware as well as software and through the use of optical connections in addition to radio frequencies, she said. Daniel Devasiratham, SAIC Wireless Systems Group vp, suggested customer networking equipment might be designed so it couldn’t be turned on without activating security protections. The costs of industry failure to rise to the issue are that all wireless technologies will be tarred as unreliable when any, such as Wi-Fi, suffers a notorious breach, and the govt. will be tempted to impose mandates, he said. — *LT*

International

How to compete in the European Union’s (EU) new telecom regulatory environment is the subject of a 2-day conference in March. Supported by the European Public Telecoms Network Assn., the conference targets best practice solutions for dealing with the new electronic communications rules, which all EU member states must adopt and implement by July. Topics include: (1) The application of the new framework. (2) The role national regulatory authorities will play. (3) The impact of the new framework on the regulation of traditional and nontraditional telecom networks. (4) The commercial impact of the framework for communications companies. (5) The role of the Independent Regulators Group under the new scheme. Speakers include representatives of the European Commission, industry officials and representatives of the national telecom agencies. The conference is March 10-11 at The Hatton, London — www.smi-online.co.uk/neweuregs8.asp.

Showing the growing recognition of the importance of intellectual property (IP) protection in economic growth, 54 countries last year signed onto various treaties administered by the World Intellectual Property Organization (WIPO). Fifty-four instruments of accession were filed in 2002, WIPO said, 54% by developing countries, 42% by nations transitioning to a market economy and 4% by developed countries. A key development last year was the entry into force of the WIPO Copyright Treaty and the Performances and Phonograms Treaty (WPPT), both aimed at updating copyright for the Digital Age, the organization said. The Copyright Treaty extends copyright protection to computer programs and data compilations. Last year, 9 countries acceded to the treaty, which now has a total of 39 contracting states, WIPO said. The WPPT deals with IP rights of performers and producers of phonograms. In 2002, 11 countries signed on, increasing the total of signatories to 39, WIPO said.

Domain Names

ICANN’s Security & Stability Committee recommended Tues. that Whois domain-name data be validated at the time of a registrant’s initial registration and regularly thereafter, and that Whois records that couldn’t be validated be frozen or held for updating or removal. Whois information must be made accessible by being updated to

support the recent architecture shift separating registrar and registry functions (which makes searching the database difficult), the panel said. The data returned by Whois must be in a common format, it said. However, the committee said, registrants' privacy also must be protected by the development of methods to discourage the harvesting or mining of Whois data by spammers.


Industry Notes

Contractions in capital expenditures and operating expenses will cause growth in IT spending to decline 0.2% this year, according to a survey by *CIO Insight* magazine. Large companies predicted a 0.5% decline in budgeted spending, the study said, but small companies predicted a 5% increase. Wireless networking spending such as for Wi-Fi equipment could grow 19%, but landline networking hardware and voice over IP equipment could drop 13% each.

Broadband access at home increased 59% from Dec. 2001 to Dec. 2002, Nielsen/NetRatings reported, with more than 33.6 million high-speed home users. However, dial-up access declined 10% to 74.4 million. Analyst Greg Bloom said: "2002 marked an entire year of decline for narrowband usage at home. As the broadband infrastructure continues to expand across the U.S., we expect to see the mainstream online population convert to higher speeds." Broadband users spent more than 17 hours on line in Dec., vs. fewer than 10 hours for dial-up, the study said.

Internet People

Ross Curtis, ex-BearingPoint, named senior vp-global sales, Global eXchange Services... **Mike Pinches**, ex-Vodafone, named non-exec. dir., UbiNetics.

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