ACIS
American Committee for Interoperable Systems

September 24, 1992

The Honorable William J. Hughes
341 Cannon House Office Building
Washington, D.C. 20515-3002

Re: S. 893

Dear Chairman Hughes:

We have reviewed the latest House version of S. 893. While we are encouraged that the multiple copies threshold of the Senate version of S. 893 and the current 18 USC § 2319 has been restored, we still have some significant concerns.

1. The multiple copies threshold may have little effect because of the absence of a requirement that the threshold be met within a specified period -- 180 days in the case of both the Senate version and 18 USC § 2319. In the absence of such a specified period, it is unclear whether the 10 copies must be made at one time, or anytime within the statute of limitations, which we understand to be three years. If all the copies a person (or a corporation) makes during a three year period can be aggregated to meet both the multiple copies and the retail value thresholds, we fear that the class of felons under this bill will be extremely large -- perhaps almost every person or corporation in the United States with access to a computer or a photocopier. We feel the 180 day period contained in the Senate version and the existing statute reasonably limits the class of felonious copyright infringers.

2. The latest House version drops the willfullness standard contained in the earlier House version. We assume this was done in response to the September 16, 1992 letter of AFMA, CBEMA, MPAA, RIAA, et al. concerning S. 893 ("AFMA Letter"). The AFMA Letter, however, contains a significant contradiction on the issue of willfulness. On page 2, the AFMA Letter states that willfulness should mean "the intent to copy, rather than the intent to infringe or to violate the law." On page 6, by contrast, it argues for a far narrower test of criminal intent: "that the defendant knew, or ought reasonably to have known, that the conduct was infringing." This latter standard is in fact very similar to the definition of willfullness contained in the earlier House version of S. 893.

3. The circuit court decision on which the AFMA Letter relies for the "intent to copy" standard is almost 50 years old. More recent circuit court decisions, including

U.S. v. Hux, 940 F.2d 314 (8th Cir. 1991), U.S. v. Gottesman, 724 F.2d 1517 (11th Cir. 1984) and U.S. v. Cross, 816 F.2d 297 (7th Cir. 1987) support the narrower knowledge of infringement standard.

4. We frankly are surprised at the AFMA Letter's assertion that "[t]he law applicable to unauthorized copying of copyrighted works for commercial gain is not complicated...." Some of the issues raised by copyright cases in commercial contexts are among the most difficult in our jurisprudence. U.S. courts for over a century have had great difficulty drawing the line between protectable expression and unprotectable ideas, or determining whether two works were "substantially similar" in expression. The one area where copyright law is "not complicated" is when verbatim copying occurs. If the House version were limited to verbatim copying, then it might make sense to have an "intent to copy" standard. So long as the proposed statute applies by its terms to both simple "literal similarity" and complicated "non-literal similarity," the knowledge of infringement standard is appropriate. You correctly acknowledged this in your statement introducing the earlier House version.

5. The AFMA Letter acknowledges that it seeks in this legislation to deter "massive commercial copyright infringement." As we have stated in our earlier letters concerning S. 893, ACIS completely agrees with this goal. We believe any statute imposing felony penalties for copyright infringement should be carefully tailored to address precisely the targeted conduct -- piracy -- and nothing else. Accordingly, a copyright piracy provision ideally should incorporate the following elements: a knowledge of infringement standard of intent; multiple copies and minimum value thresholds that must be met within a clearly defined period of time; an exact (or near exact) duplication requirement; and an intent to distribute to the public requirement. We understand that at this late date it may be impossible to craft language agreeable to all affected industries that includes all these elements. This, we believe, leaves the Congress with only two acceptable alternatives. First, it could enact the Senate version of S. 893 with clear legislative history stating (a) that an infringement of a copyright in a computer program is willful only if the infringer engaged in activities he or she knew to be unlawful; and (b) that the legislation is aimed at software pirates who engage in line for line copying of computer programs, not legitimate developers who duplicate the functionalities or the "look and feel" of other programs, or who engage in reverse analysis. Second, the Congress could simply decide to take a fresh look at this issue next term.

We look forward to discussing this issue with you and your staff.

Sincerely,

Peter M. C. Choy
Chairman

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