LEGISLATIVE UPDATE

INTRODUCTION

Legislative Update is a survey of recent federal and state legislation relating to various aspects of high technology.[1] The survey is comprised of brief summaries of new laws grouped under appropriate topic headings. Each summary includes a citation to the new law.

Although *Legislative Update* includes a broad selection of new technology related legislation, it is not intended to be comprehensive. In addition, the summaries do not mention aspects of the new laws that do not address high technology issues.

I. TECHNOLOGY AND DEVELOPMENT

A. Intellectual Property

United States — Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (*to be codified as amended at* 17 U.S.C. §§ 101-804 (1988)).

The United States Congress has amended Title 17 of the U.S. Code, which deals with copyright protection, to bring U.S. law into conformity with the Berne Convention for the Protection of Literary and Artistic Works. Under this Act, the Berne Convention's provisions are enforceable only through actions brought pursuant to Title 17 or any other relevant federal or state law, not through the Convention itself. Both the Convention and the Act entered into force under U.S. law on March 1, 1989.

1. *High Technology Law Journal* wishes to thank Information for Public Affairs of Sacramento, California for providing us with access to their comprehensive computerized database of state legislation, and the law firm of Wilson, Sonsini, Goodrich & Rosati of Palo Alto, California for providing us with access to materials in their library.

The most important change is that works of authorship are automatically protected by copyright. Notice on the work is no longer required to obtain or maintain such protection. The Berne Amendments also make the special notice prescribed for copies that consist preponderantly of U.S. government works an option rather than a condition of copyright. As the Amendments expressly exclude public domain works from protections, copies publicly distributed without notice before the Amendments' effective date will remain unprotected.

Incentives for copyright owners to affix notice continue. The House Report on the Berne Amendments notes that notice is "in all probability the cheapest deterrent to infringement". For instance, if notice is affixed to a work to which an alleged infringer had access, the court will generally not mitigate damages in response an "innocent infringement" defense. Finally, notice continues to be required to avoid complying with formalities imposed in UCC member states.

For works originating in the United States, registration of copyright is still a prerequisite for filing an infringement suit, but this requirement has been eliminated for works originating in other Berne Convention Countries. However, registration continues to be in the best interests of all copyright owners as it will automatically constitute prima facie evidence of the copyright's validity and of the facts stated in the certificate. (This is true only if the registration was made within five years of the work's publication.) Registration within three months of the work's publication entitles the copyright owner to statutory damages and attorney's fees. Further, registration is required in order to give constructive notice of the transfer of a subsequently recorded transfer of interest.

Recordation of the transfer of copyright ownership is also no longer a prerequisite of an infringement suit. However, recordation still provides constructive notice of the transfer and gives it priority over subsequent conflicting transfers under certain conditions. Also, the Amendments probably do not eliminate the recordation requirement in the case of any cause of action arising before the Amendments' effective date.

The Amendments also expand the basis for protecting works of foreign origin to "Berne Convention works." These are defined as works in which "one or more of the authors is a national of a nation adhering to the Berne Convention on the date of first publication" and any work that was "first published in a nation adhering to the Berne Convention, or was simultaneously first published in a nation adhering to the Berne Convention and in a foreign nation that does not adhere to the Berne Convention."

The Berne Convention requires member states to recognize the moral rights or integrity and paternity. The paternity right is right to have the work attributed to its author and the integrity right is the right of the author to prevent distortion or mutilation of the work. By declaring that the Berne Convention is not self-executing, and by providing that the obligations of the United States under Berne "may be performed only pursuant to appropriate domestic law," the Amendments effectively prevent claimants from invoking the terms of the Berne Convention as an independent basis for relief.

The Amendments also raise the minimum statutory award in the ordinary case to $500 from $250 and the maximum statutory award in the ordinary case to $20,000 from $10,000. In the case of willful infringement the maximum award is raised from $50,000 to $100,000. In cases of innocent infringement the court may now award a minimum of $200, rather than the previous $100.

Lastly, the requirement that a work be published "with notice of copyright" as a condition to imposing the mandatory deposit requirement has been eliminated.

United States

Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342 (1988) (*codified at* 19 U.S.C. § 1337 (1988)).

Section 337 of the Tariff Act of 1930 has been amended to provide a more effective protection for United States intellectual property rights. The Act was based on congressional findings that the existing protection against unfair trade practices was cumbersome and costly and had not provided owners of United States intellectual property rights with adequate protection against foreign companies violating such rights. The amendment clarifies the prior general prohibition against the importation of articles with the natural tendency to substantially injure a United States industry by expressly prohibiting the the importation of articles infringing on valid and enforceable United States copyrights, patents, trademarks, and semiconductor chips. The Act also provides more expedient methods to gain temporary and permanent exclusion of such articles and stiffer enforcement of such exclusions.

United States

Trademark Law Revision Act of 1988, Pub. L. No. 100-677, 102 Stat. 3995 (*to be codified at* 15 U.S.C. § 1051 (1988)).

The purpose of the Trademark Law Revision Act is to bring the trademark law up-to-date with present day business practices, to increase the value of the federal trademark registration system for U.S. companies, to remove the current preference for foreign companies applying to register trademarks in the United States and to improve the law's protection of the public from counterfeiting, confusion, and deception. To that end, this Act eliminates the requirement that U.S. citizens and businesses use a mark in commerce before they can file an application to register it.

Under the prior law, U.S. businesses or individuals seeking to register a trademark had first to make use of the mark in interstate commerce before being eligible for registration. Foreign counterparts were under no such requirement, and the U.S. was the only developed country in the world that require its citizens use a mark before filing. This Act also confronts the problem of "deadwood" by 1) decreasing the terms of trademark registration and renewals from 10 to 20 years; 2) imposing stricter requirements for maintaining a registration beyond its initial 6 years; and 3) will preclude the issuance of registrations based on token use, thereby reducing the number of registered marks for which commercial use has not been made, and it will increase the use requirements both for maintaining and renewing applications. Finally, the Act seeks to protect federally registered marks that are famous from "dilution" by creating a highly selective federal cause of action.

B. Electronic Surveillance, Databases and Privacy

United States

Computer Matching and Privacy Protection Act of 1988, Pub. L. No. 100-503, 102 Stat. 2507 (1988) (*codified as amended at* § 5 U.S.C. 552a note (1988)).

The Computer Matching and Privacy Protection Act of 1987 regulates government use of computerized comparisons of federal data records 1) to establish or verify eligibility for federal benefit programs, or 2) for the purpose of taking adverse financial, personnel, or disciplinary action against a federal employee. The Act provides that agencies are prohibited from disclosing data to another federal or non-federal agency for computer matching purposes unless the participating agencies give notice in the Federal Register and enter into a written agreement including: a description of records to be matched; the purpose, legal authority, justification, and anticipated results of the matching; the method of giving notice to those individuals indicated by the matching results; and the security and verification procedures which the agency will employ. Before any action may be taken on the

results of the matching program, the results must be independently verified, and the individual against whom adverse action is contemplated must be given notice of the findings and an opportunity to dispute the findings. Every agency conducting or participating in a computerized record matching program must establish a Data Integrity Board to review, approve, and maintain all written agreements and produce an annual report to the Office of Management and Budget describing the agency's matching activity.

C. Technology Transfer and Intellectual Property

United States

Act of Oct. 18, 1988, Pub. L. No. 100-506, 102 Stat. 2538, 2538-39 (*to be codified as amended at* 11 U.S.C. § 101 88)).

Sections 101 and 365 of the Bankruptcy Code have been amended to permit an intellectual property licensee to elect to continue the existing use of licensed property when the licensor files bankruptcy and the trustee revokes the license agreement. The change was intended to reverse a recent appellate court decision allowing the debtor to declare the license contract executory, and thereby terminate the licensee's use of the property. Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985).

D. Technology and Government Agencies

United States

National Superconductivity and Competitiveness Act of 1988, Pub. L. No. 100-697, 102 Stat. 3935 (*to be codified at* 15 U.S.C. § 5201 (1988)).

This Act provides for a national five-year action plan to establish the goals and priorities of a federally-funded research and development program in high-temperature superconductivity. The Office of Science and Technology Policy (OSTP) will lead the responsibility in developing this plan which calls for the Director of OSTP to work with the National Critical

Materials Council and the newly created National Commission on Superconductivity to develop goals and priorities. Specifically, the legislation hopes to build upon the work of Karl Alex Muller and Georg Bednorz, two researches as the IBM Research Faculty in Zurich, Switzerland, as well as Dr. Paul Chu of the University of Houston and Dr. M.K. Wu of the University of Alabama, who have had recent success in achieving superconductivity at temperatures above 30 degrees K using complex ceramic compounds. The plan is not intended to promote programs of specific commercial application, but is limited to basic, fundamental research and development. It is hoped that through this Act a U.S. national effort involving both private and public sectors will be advanced, and America's leadership in this crucial technology will be maintained.

United States

Computer Security Act of 1987, Pub. L. No. 100-235, 101 Stat. 1724 (1988) (amending 15 U.S.C. §§ 271-278h, 40 U.S.C. § 759(d), and enacting 40 U.S.C. § 759 note (1988)).

The Computer Security Act of 1987 creates a means for establishing minimum acceptable security practices for federal computer systems. The Act assigns to the National Bureau of Standards responsibility for developing standards and guidelines necessary to assure the cost effective security and privacy of the federal computer system, drawing on technical advice and assistance from the National Security Agency. These standards will then be promulgated by amending section 111(d) of the Federal Property and Administrative Act of 1949 (40 U.S.C. 759(d)), providing for the establishment of a Computer System Security and Privacy Advisory Board as an advisory body working under the Department of Commerce. The Act also requires that each federal agency periodically train appropriate employees in computer security awareness practices, and specifically identify

computer systems within the agency that contain sensitive information.

Alaska — The Alaska Science and Technology Foundation has been established to promote economic development and technological innovation in Alaska and sustained growth and development of Alaskan scientific and engineering capabilities. To facilitate such goals, the foundation issues grants for basic and applied research. (The state had formerly established the Alaska Council on Science and Technology under ALASKA STAT. § 44.21.241 (1981), which was repealed in 1985.) Act of ____, 1988, ch. 37, 1988 Alaska Sess. Laws ____ (*codified at* ALASKA STAT. §§ 37.17.010 to .110 (1988)).

Florida — This act amends and readopts for a ten-year period FLA. STAT. §§ 229.8053, 240.539 (1983), which were originally due to be repealed Oct. 1, 1988. These statutes have set up the Florida High Technology Council, which purpose is to aid the state economy by coordinating the needs of high technology businesses with state government programs (including education). The act also defines "high technology" as used in these statutes to mean "the application of new technological developments . . . to cause changes in the workplace and provide the technological basis for the society of the future." Act of June 28, 1988, ch. 134, 1988 Fla. Laws 714 (*codified as amended at* FLA. STAT. §§ 229.8053, 240.539 (1988)).

E. Technology Incentives

United States — Commercial Space Launch Act Amendments of 1988, Pub. L. No. 100-677, 102 Stat. 3900 (*to be codified at* 49 App. U.S.C.A § 2601 (1988)).

The purposes of this legislation are: to amend the Commercial Space Launch Act; to provide interim transitional support; to ensure the successful development of a competitive domestic expandable launch vehicle (ELV) industry; to apportion launch liability risks between the domestic commercial space launch

industry and the U.S. Government; to provide incentives for certain satellite that were removed by a Presidential directive from the space shuttle manifest to launch on domestic ELV's; to establish protections against Government pre-emption of commercial launches on Governmental ranges; and to recommend the formulation of international "rules of the road" as regards the conduct and pricing of commercial space launch activities. Accordingly, the bill is intended to provide a mechanism in which domestic launch activities can change from a public activity, which it has traditional been, to a wholly private endeavor. It is hoped that this bill creates an environment where world insurance markets can grow and mature to meet the needs of a domestic launch industry. To that end, the bill provides a risk-sharing arrangement between industry and the Government to enable the emerging launch industry to compete on a more equal footing with foreign launch concerns.

United States

Technology-related Assistance for Individuals with Disabilities Act of 1988, Pub. L. 100-407, 102 Stat. 1044 (*codified at* 29 U.S.C. § 2201 (1988)).

The technology-related assistance for individuals with disabilities act is a two part legislation. Part I allows states to compete for three year grants that are renewable for two years. Ten states will be awarded the grants in the first year of availability. Twenty states will be awarded in the second year. The remaining states are eligible in the third year. Funding per state is $500,000 to $1,000,000 for years one and two with $500,000 to $1,500,000 for years three to five. The Secretary of Education will also provide technical assistance. The grants are anticipated to spur states to review policies and procedures related to assistive technologies and services. Part II of the legislation allows discretionary activities and studies in the assistive technologies and services areas. Training and public awareness of developed devices is to be encouraged. It is anticipated that the expansion of assistive technology will enable individuals to have greater control over their lives. The assistive

technologies should afford a greater ability to participate in home, school and work environments.

California

The Act authorizes the Director of the Office of Information Technology to allocate monies to projects which demonstrate or develop advanced information technologies as solutions to information processing problems. The monies for this fund are taken in part from amounts not to exceed 1% of the budgets of the Stephen P. Teale Data Center and the Health and Welfare Agency Data Center Revolving Funds. If the balance remaining in the Fund exceeds 25% of the Center or Agency budgets, the excess amount shall be used to reduce billing rates for services rendered during the following year.

Act of September 20, 1988, ch. 1146 §§ 2-4, 1988 Cal. Adv. Legis. Serv. 38-39 (Deering *codified at* CAL. GOV'T CODE §§ 11752-11755 (Deering Supp. 1988)).

II. TELECOMMUNICATIONS

A. Regulation of Telecommunications Corporations

United States

Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (*to be codified at* 15 U.S.C. § 1051 (1988)).

The purpose of this legislation is to create an interim statutory license in the Copyright Act for satellite carriers to retransmit television broadcast signals of superstations and network stations to earth station owners for private home viewing. The bill clarifies the legal status of satellite carriers that market or sell the service of delivering signals that embody copyrighted programming, and insure that earth station owners will have access to that programming, while protecting the existing network/affiliate distribution system to the extent that is successful in providing programming by other technologies. Accordingly, the legislation amends the Copyright Act of 1976 to provide for the temporary licensing of the secondary

transmission by satellite carriers of superstations and networks stations for the private viewing by owners of earth stations, and creates a system by which scrambled superstation and network signals can by transmitted by satellite carriers, through distributors, to earth station owners.

The bill creates a statutory licensing system during a four-year period (phrase one) with copyright royality rates established at a flat rate fee of 12 cents a month per subscriber for each received superstation signal and 3 cents per month subscriber for each received network signal. During a second two-year period, (phase two), rates are set by negotiation and binding arbitration. After six years, the entire legislation package is terminated by a "sunset" provision. After six years, Congress fully expects the parties will report back concerning the success or failure of the plan.

B. Telecommunications Access.

United States

Hearing Aid Compatibility Act of 1988, Pub. L. 100-394, 102 Stat. 976, (*to be codified at* 47 U.S.C. § 609 (1988)).

Congress has enacted this legislation to require, that to the fullest technological extent, hearing impaired persons should have equal access to the national telecommunications network. It is the hope of Congress that this Act will lead to greater employment opportunities and increased productivity for the hearing-impaired.

The standards currently in use for hearing aid compatibility shall be adopted as the national standard. All telephones manufactured or imported after August 16, 1989 must conform to the standard. Congress has allowed compliance exemption for i) telephones used with public mobile services; ii) telephones used with private radio services; iii) cordless telephones;

and iv) secure telephones. All other exemptions must be secured by F.C.C. proceedings.

United States

Telecommunications Accessibility Enhancement Act of 1988, Pub. L. 100-542, 102 Stat. 2721 (*to be codified at* 40 U.S.C. § 762 (1988)).

The purpose of this legislation is to enhance telecommunication accessibility for both the over 24 million hearing-impaired and the 2.8 million speech-impaired individuals in the United States

The legislation requires continuation and expansion of the existing operator relay system; ii) the creation within 18 months of a rule making body by the Federal Communications Commission (F.C.C.) to ensure telecommunication devices for the deaf (TDDs) in federal agencies; iii) the publication of a TDD directory of government access numbers; iv) the adoption of a TDD logo identifying TDD stations; v) support for the development of cost-reducing technologies; and vi) an inquiry within 9 months of enactment concerning a TDD interstate relay system.

The system will allow a TDD user to converse with TDD or non-TDD users. A relay operator will take the initiators communications and translate for the receiver. The relay operator will use a video display system to forward the messages in the required format, spoken or typed.

United States

Public Telecommunications Act of 1988, Pub. L. 100-626, 102 Stat. 3207 (*to be codified at* 47 U.S.C. § 609 (1988).

The purpose of this legislation is to provide funding for the Corporation for Public Broadcasting (CPBnd the Public Telecommunications Facilities Program (PTFP). The act will authorize funds related to the replacement, refurbishment, and upgrade of the public broadcasting system's national satellite interconnection system.

The act also provides for the establishment of an independent production service (IPS). IPS would exist for the purposes of funding the production of television programs by independent producers and production entities. CPB is directed to ensure the funding be used to expand diversity and innovation in programming available to public broadcasting.

III. CONSUMER PROTECTION AND ELECTRONICS

Kansas

In enacting a broad revision of its sales tax policy, Kansas has included computer software programs that are not custom made as taxable tangible personal property. Such property includes the services of modifying, altering, updating, and maintaining computer software (but in some cases do not include modification services developed exclusively for a single-end user). KAN. STAT. ANN. § 79-3603(s) is of particular relevance. Act of May 17, 1988, ch. 386, 1988 Kan. Sess. Laws 2401 (to be codified as amended at KAN. STAT. ANN. §§ 12-190, 79-3602, -3603, -3606, -3609, -3642 (1988)).

IV. ENERGY

United States

Alternative Motor Fuels Act of 1988, Pub. L. 100-494, 102 Stat. 2441 (*codified at* 42 U.S.C. § 6201 (1988)).

The purpose of this legislation is to increase the availability of vehicles powered by natural gas, methanol and ethanol. It is Congress' belief that the use of alternative fuels would reduce America's dependence on imported oil. A transfer to alternate fuels would reduce the amounts of unhealthy emissions produced by the burning of crude oil products. Alternative fuels burn cleaner than gasoline, diesel, and industrial fuel oil.

The program calls for a floating 10 year period between 1993 and 2005. In that period manufacturers would receive special treatment. Congress believes that special incentives to auto manufacturers will increase production of alternative fuel vehicles. The special incentives will indirectly drive concurrent expansion of alternative fuel production.