Libraries and the Copyright Provisions in Omnibus Spending Bill

The omnibus spending bill just passed by the U.S. Congress and signed into law by the President contains two provisions relating to copyright law. Neither will have a major impact on libraries, but one could harm library users.

Felony Streaming

The provision that would harm neither libraries nor their users extends felony penalties to unlawful streaming services. The existing criminal copyright framework allows prosecutors to seek felony penalties (imprisonment for more than a year) for willful infringement of the reproduction right and the distribution right, but only misdemeanor penalties (imprisonment for less than a year) for infringement of the public performance right. This is because in the past, criminal copyright activities related to the large-scale creation and distribution of infringing copies. As online infringement migrated from downloads to streaming, rights holders sought the prosecution of unlawful streaming services. The U.S. Department of Justice claimed that without the availability of felony penalties, a prosecutor had insufficient incentive to pursue unlawful streaming services, which infringe the public performance right, but arguably not the reproduction or distribution rights. Accordingly, rights holders lobbied Congress to extend felony penalties to willful infringement of the public performance right.

The problem is that in the Internet environment, a single allegedly infringing work uploaded by an individual to a streaming platform might receive a million views. Members of Congress did not want to treat such an individual as a felon. Plugging the so-called "felony streaming loophole," therefore, took careful drafting to ensure that the felony penalties applied only to unlawful streaming services, and not to individuals posting videos on streaming platforms or legitimate platforms on which infringing videos might be posted.

Senate IP Subcommittee Chairman Thom Tillis convened stakeholders to address this issue. After six months of negotiations among representatives of rights holders, consumers, broadcasters, and technology companies, agreement was reached on language extending felony penalties to a commercial digital transmission service that (1) is primarily designed or provided for the purpose of publicly performing works unlawfully; (2) has no commercially significant purpose other than to publicly perform works unlawfully; or (3) is intentionally marketed by or at the direction of that person to promote its use in publicly performing works unlawfully. A legitimate library or library user would not meet this standard and thus would not be subject to felony prosecution.

Small Claims Tribunal

In contrast, the omnibus bill also includes a problematic provision establishing a small claims tribunal in the Copyright Office. While libraries can easily avoid becoming enmeshed in proceedings before the Copyright Claims Board ("CCB"), this new forum could be abused by copyright "trolls" to extract significant copyright damages from unsophisticated individuals.

Groups representing individual rights holders such as photographers have long sought a low-cost alternative to copyright infringement litigation in federal court. Because of the relatively small

dollar value of their claims, individual creators reportedly have difficulty finding lawyers willing to help them enforce their claims.

The U.S. Copyright Office in 2013 issued a report endorsing the establishment of a small claims tribunal in the Copyright Office. The Copyright Alternatives in Small-Claims Enforcement ("CASE") Act passed the House in 2019, and was included in the omnibus bill. Only claims for under $30,000 can be brought before the CCB. The CCB process has several significant disadvantages from a defendant's perspective, relative to a regular infringement proceeding in federal court. These include limited discovery; no jury trial; limited rights of appeal; and exposure to statutory damages of $7,500 for a work that was not registered with the U.S. Copyright Office prior to infringement. (In regular court proceedings, only actual damages—and no statutory damages—are available for infringement of a work that was not registered prior to the infringement.)

Significantly, a defendant has the right to opt-out of proceedings before the CCB, in which case the rights holder would have to pursue its claims in federal court. However, there is a danger that unsophisticated defendants would not understand that it typically would be in their interest to opt-out. Upon receiving a notice from the CCB, they would do nothing, and then find themselves hauled before an administrative tribunal.

The bill contains two important protections for libraries. First, CCB claims cannot be brought against state government entities. Most public colleges and universities, and their libraries, are state government entities and thus are excluded from the possible jurisdiction of the CCB. For example, the University of California is operated by the State of California, and accordingly is outside the scope of the CCB process.

However, most public libraries are run by municipal or county governments, not state governments; hence, they would be subject to the CCB process. Additionally, CCB claims could be brought against private universities, such as Harvard or Yale. To protect these libraries, Congress adopted a "preemptive opt-out" for libraries and archives. A library could file a notice with the Copyright Office that it wants to opt-out of all CCB proceedings, as opposed to opting-out every time a CCB claim is filed against it.

While these two measures protect libraries, they do not protect the libraries' users. University faculty and students could still be subject to claims before the CCB based on their allegedly infringing use of university library resources. Libraries, therefore, will need to educate their users on the advantages to opting-out in most cases.