Congress and the public about the activities of federal agencies in the enforcement of federal law. Senator HATCH and I offer as an amendment to H.R. 3111 the text of a bill, S. 1769, which I introduced with Chairman HATCH on October 22, 1999 and which passed the Senate on November 5, 1999. This amendment will continue and enhance the current reporting requirements for the Administrative Office of the Courts and the Attorney General on the eavesdropping and surveillance activities of our federal and state law enforcement agencies.

For many years, the Administrative Office (AO) of the Courts has complied with the statutory requirement, in 18 U.S.C. §2519(3), to report to Congress annually the number and nature of federal and state applications for orders authorizing or approving the interception of wire, oral or electronic communications. By letter dated September 3, 1999, the AO advised that it would no longer submit this report because ''as of December 21, 1999, the report will no longer be required pursuant to the Federal Reports Elimination and Sunset Act of 1995.'' I commend the AO for alerting Congress that their responsibility for the wiretap reports would lapse at the end of this year, and for doing so in time for Congress to take action.

The AO has done an excellent job of preparing the wiretap reports. We need to continue the AO's objective work in a consistent manner. If another agency took over this important task at this juncture and the numbers came out in a different format, it would immediately generate questions and concerns over the legitimacy and accuracy of the contents of that report.

In addition, it would create difficulties in comparing statistics from prior years going back to 1969 and complicate the job of congressional oversight. Furthermore, transferring this reporting duty to another agency might create delays in issuance of the report since no other agency has the methodology in place. Finally, federal, state and local agencies are well accustomed to the reporting methodology developed by the AO. Notifying all these agencies that the reporting standards and agency have changed would inevitably create more confusion and more expense as law enforcement agencies across the country are forced to learn a new system and develop a liaison with a new agency.

The system in place now has worked well and we should avoid any disruptions. We know how quickly law enforcement may be subjected to criticism over their use of these surreptitious surveillance tools and we should avoid aggravating these sensitivities by changing the reporting agency and methodology on little to no notice. I appreciate, however, the AO's interest in transferring the wiretap reporting requirement to another entity. Any such transfer must be accomplished with a minimum of disruption to the collection and reporting of information and with complete assurances that any new entity is able to fulfill this important job as capably as the AO has done.

The amendment would update the reporting requirements currently in place with one additional reporting requirement. Specifically, the amendment would require the wiretap reports prepared beginning in calendar year 2000 to include information on the number of orders in which encryption was encountered and whether such encryption prevented law enforcement from obtaining the plain text of communications intercepted pursuant to such order.

Encryption technology is critical to protect sensitive computer and online information. Yet, the same technology poses challenges to law enforcement when it is exploited by criminals to hide evidence or the fruits of criminal activities. A report by the U.S. Working Group on Organized Crime titled, ''Encryption and Evolving Technologies: Tools of Organized Crime and Terrorism,'' released in 1997, collected anecdotal case studies on the use of encryption in furtherance of criminal activities in order to estimate the future impact of encryption on law enforcement. The report noted the need for ''an ongoing study of the affect of encryption and other information technologies on investigations, prosecutions, and intelligence operations.'' As part of this study, ''a database of case information from federal and local law enforcement and intelligence agencies should be established and maintained.'' Adding a requirement that reports be furnished on the number of occasions when encryption is encountered by law enforcement is a far more reliable basis than anecdotal evidence on which to assess law enforcement needs and make sensible policy in this area.

The final section of this amendment would codify the information that the Attorney General already provides on pen register and trap and trace device orders, and require further information on where such orders are issued and the types of facilities—telephone, computer, pager or other device—to which the order relates. Under the Electronic Communications Privacy Act (''ECPA'') of 1986, P.L. 99–508, codified at 18 U.S.C. 3126, the Attorney General of the United States is required to report annually to the Congress on the number of pen register orders and orders for trap and trace devices applied for by law enforcement agencies of the Department of Justice. As the original sponsor of ECPA, I believed that adequate oversight of the surveillance activities of federal law enforcement could only be accomplished with reporting requirements such as the one included in this law.

The reports furnished by the Attorney General on an annual basis compile information from five components of the Department of Justice: the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the United States Marshals Service and the Office of the Inspector General. The report contains information on the number of original and extension orders made to the courts for authorization to use both pen register and trap and trace devices, information concerning the number of investigations involved, the offenses on which the applications were predicted and the number of people whose telephone facilities were affected.

These specific categories of information are useful, and the amendment would direct the Attorney General to continue providing these specific categories of information. In addition, the amendment would direct the Attorney General to include information on the identity, including the district, of the agency making the application and the person authorizing the order. In this way, the Congress and the public will be informed of those jurisdictions using this surveillance technique—information which is currently not included in the Attorney General's annual reports.

The requirement for preparation of the wiretap reports will soon lapse so I am delighted to see the Senate take prompt action on this legislation to continue the requirement for submission of the wiretap reports and to update the reporting requirements for both the wiretap reports submitted by the AO and the pen register and trap and trace reports submitted by the Attorney General.●

DIGITAL THEFT DETERRENCE AND COPYRIGHT DAMAGES IMPROVEMENT ACT OF 1999

● Mr. LEAHY. Mr. President, the Senate is today passing an important bill, H.R. 3456, which is the Hatch-Leahy-Schumer ''Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.'' This legislation should help our copyright industries, which in turn helps both those who are employed in those industries and those who enjoy the wealth of consumer products, including books, magazines, movies, and computer software, that makes the vibrant culture of this country the envy of the world.

This legislation has already traveled an unnecessarily bumpy road to get to this stage of final passage, and it should be sent promptly to the President's desk.

On July 1, 1999, the Senate passed four intellectual property bills, which Senator HATCH and I had joined in introducing and which the Judiciary Committee had unanimously reported. Each of these bills (S. 1257, the text of which is considered today as H.R. 3456; S. 1258, the ''Patent Fee Integrity and Innovation Protection Act''; S. 1259, the ''Trademark Amendments Act''; and S. 1260, the ''Copyright Act Technical Corrections Act'') make important improvements to our intellectual

property laws, and I congratulate Senator HATCH for his leadership in moving these bills promptly through the Committee and the Senate.

Three of those four bills then passed the House without amendment and were signed by the President on August 5, 1999. The House sent back to the Senate S. 1257, the ''Digital Theft Deterrence and Copyright Damages Improvement Act,'' with two modifications which I will describe below. Working with Senator HATCH and our colleagues in the House, we agreed upon additional revisions in the bill, which was then introduced as H.R. 3456 and passed by the House yesterday in time for Senate consideration before the end of this congressional session.

I have long been concerned about reducing the levels of software piracy in this country and around the world. The theft of digital copyrighted works and, in particular, of software, results in lost jobs to American workers, lost taxes to Federal and State governments, and lost revenue to American companies. A recent report released by the Business Software Alliance estimates that worldwide theft of copyrighted software in 1998 amounted to nearly $11 billion. According to the report, if this ''pirated software has instead been legally purchased, the industry would have been able to employ 32,700 more people. In 2008, if software piracy remains at its current rate, 52,700 jobs will be lost in the core software industry.'' This theft also reflects losses of $991 million in tax revenue in the United States.

These statistics about the harm done to our economy by the theft of copyrighted software alone, prompted me to introduce the ''Criminal Copyright Improvement Act'' in both the 104th and 105th Congresses, and to work for passage of this legislation, which was finally enacted as the ''No Electronic Theft Act of 1997,'' Pub. L. 105–147. The current rates of software piracy show that we need to do better to combat this theft, both with enforcement of our current copyright laws and with strengthened copyright laws to deter potential infringes.

The Hatch-Leahy-Schumer ''Digital Theft Deterrence and Copyright Damages Improvement Act'' would help provide additional deterrence by amending the Copyright Act, 17 U.S.C. § 504(c), to increase the amounts of statutory damages recoverable for copyright infringements. These amounts were last increased in 1988 when the United States acceded to the Berne Convention. Specifically, the bill would increase the cap on statutory damages by 50 percent, raising the minimum from $500 to $750 and raising the maximum from $20,000 to $30,000. In addition, the bill would raise from $100,000 to $150,000 the amount of statutory damages for willful infringements.

Courts determining the amount of statutory damages in any given case would have discretion to impose damages within these statutory ranges at just and appropriate levels, depending on the harm caused, ill-gotten profits obtained and the gravity of the offense. The bill preserves provisions of the current law allowing the court to reduce the award of statutory damages to as little as $200 in cases of innocent infringement and requiring the court to remit damages in certain cases involving nonprofit educational institutions, libraries, archives, or public broadcasting entities.

Finally, the bill provides authority for the Sentencing Commission expeditiously to fulfill its responsibilities under the ''No Electronic Theft Act,'' which directed the Commission to ensure that the guidelines provide for consideration of the retail value and quantity of the items with respect to which the intellectual property offense was committed. Since the time that this law became effective, the Sentencing Commission has not had a full slate of Commissioners serving. In fact, we have had no Commissioners since October, 1998. This situation was corrected on November 10th with the confirmation of seven new Commissioners.

As I noted, the House amended the version of S. 1257 that the Senate passed in July in two ways. First, the original House version of this legislation, H.R. 1761, contained a new proposed enhanced penalty for infringers who engage in a repeated pattern of infringement, but without any scienter requirement. I shared the concerns raised by the Copyright Office that this provision, absent a willfulness scienter requirement, would permit imposition of the enhanced penalty even against person who negligently, albeit repeatedly, engaged in acts of infringement. Consequently, the Hatch-Leahy-Schumer bill, S. 1257, that we sent to the House in July avoided casting such a wide net, which could chill legitimate fair uses of copyrighted works. Instead, the bill we sent to the House would have created a new tier of statutory damages allowing a court to award damages in the amount of $250,000 per infringed work where the infringement is part of a willful and repeated pattern or practice of infringement. The entire ''pattern and practice'' provision, which originated in the House, was removed from the version of S. 1257 sent back to the Senate.

Second, the original House version of this legislation provided a direction to the Sentencing Commission to amend the guidelines to provide an enhancement based upon the retail price of the legitimate items that are infringed and the quantity of the infringing items. I was concerned that this direction would require the Commission and, ultimately, sentencing judges to treat similarly a wide variety of infringement crimes, no matter the type and magnitude of harm. This was a problem we avoided in the carefully crafted Sentencing Commission directive originally passed as part of the ''No Electronic Theft Act.'' Consequently, the version of S. 1257 passed by the Senate in July did not include the directive to the Sentencing Commission. Nevertheless, the House returned S. 1257 to the Senate with the same problematic directive to the Sentencing Commission.

I appreciate that my House colleagues and interested stakeholders have worked over the past months to address my concerns over the breadth of the proposed directive to the Sentencing Commission, and to find a better definition of the categories of cases in which it would be appropriate to compute the applicable sentencing guideline based upon the retail value of the infringed upon item. A better solution than the one contained in the ''No Electronic Theft Act'' remains elusive, however.

For example, one recent proposal sought to add to S. 1257 a direction to the Sentencing Commission to enhance the guideline offense level for copyright and trademark infringements based upon the retail price of the legitimate products multiplied by the quantity of the infringing products, except where ''the infringing products are substantially inferior to the infringed upon products and there is substantial price disparity between the legitimate products and the infringing products.'' This proposed direction appears to be under-inclusive since it would not allow a guideline enhancement in cases where fake goods are passed off as the real item to unsuspecting consumers, even though this is clearly a situation in which the Commission may decide to provide an enhancement.

In view of the fact that the full Sentencing Commission has not had an opportunity for the past two years to consider and implement the original direction in the ''No Electronic Theft Act,'' passing a new and flawed directive appears to be both unnecessary and unwise. This is particularly the case since the new Commissioners have already indicated a willingness to consider this issue promptly. In response to questions posed at their confirmation hearings, each of the nominated Sentencing Commissioners indicated that they would make this issue a priority. For example, Judge William Sessions of the District of Vermont specifically noted that:

> If confirmed, our first task must be to address Congress' longstanding directives, including implementation of the guidelines pursuant to the NET Act. Congress directed the Sentencing Commission to fashion guidelines under the NET Act that are sufficiently severe to deter such criminal activity. I personally favor addressing penalties under this statute expeditiously.

I fully concur in the judgment of Chairman HATCH that the Sentencing Commission directive provision added by the House should be stricken. The House addressed these concerns by doing just that in the new version of the bill, H.R. 3456, which was introduced and passed by the House yesterday in time for Senate consideration before the end of this session.

This bill represents an improvement in current copyright law, and I commend its final passage.●