

Support the Vessel Hull Design Protection Act

S. 1640 Clarifies Crucial Copyright Law

BACKGROUND

The recreational boating industry invests a substantial amount of time and money into developing innovative vessels. Unfortunately, the same process for making a vessel can be used to easily copy it. "Hull splashing" is the process where an infringer makes a mold from a vessel hull of another manufacturer and then uses the mold to manufacture copies. State statutes prohibiting "hull splashing" were struck down by the Supreme Court in *Bonita Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) on the grounds that the laws were preempted by federal intellectual property law. Because the protection available to boat designers under federal patent, general copyright, or trademark law are inadequate, too time-consuming or expensive to acquire, boat designers sought a simple federal registration process to protect their designs. Congress responded by passing the Vessel Hull Design Protection Act (VHDPA) in 1998 as part of the Digital Millennium Copyright Act. The text of the law can be found at: <http://www.copyright.gov/vessels/>.

Unfortunately, recent U.S. District Court and U.S. Court of Appeals decisions have highlighted problems with the Act's effectiveness. In order to revitalize the VHDPA, Senators Leahy (D-VT), Cornyn (R-TX), Kohl (D-WI) and Whitehouse (D-RI) have introduced S. 3106, the Vessel Hull Design Protection Amendments of 2008. NMMA is working to move the Senate toward quickly passing this revised, bipartisan legislation.

ISSUE

Despite broad support, the clock ran out on similar legislation in the final hours of the 109th Congress and did not become law. Therefore, NMMA is again aggressively seeking passage of S. 3106, the Vessel Hull Design Protection Act Amendments of 2008 during the 110th Congress. The updated version of the bill reflects conversations we have had recently with the Navy and gives the Department of Defense full assurance that government and defense designs will not be subject to unwarranted restrictions.

- **VHDPA Eliminates Legal Ambiguity.** NMMA is seeking technical corrections to address problems with the VHDPA that have been brought to light by recent litigation. These changes would make clear that the design protection extends to vessel hulls and decks separately. This is to avoid a situation where a vessel hull was copied 100 percent but where changes made to a vessel's deck would negate an infringement claim. In addition, the bill would add a definition of "deck" and "hull" to the VHDPA and make other necessary conforming amendments.
- **VHDPA Would Clarify Report Language.** In addition to legislative changes, NMMA is seeking clarifying report language to provide guidance to a reviewing court on two issues. First, NMMA is seeking to clarify that a minor correction to a protected design would enjoy the same protection as the original protected design. Second, NMMA is seeking to provide a reviewing court with guiding factors for assessing "substantial similarity." In determining whether one design infringes upon another, the VHDPA requires that the two designs be "substantially similar" but provides no additional guidance. NMMA is seeking report language that will direct courts to draw from a judicially created standard under general copyright case law.
- **VHDPA Represents Industry Consensus.** These changes, which were developed by NMMA, represent the consensus position of the recreational boat manufacturing industry and NMMA knows of no opposition to them. Importantly, NMMA and the bill's sponsors have worked closely with the Copyright Office in drafting this legislation. The recreational boat building industry needs these vital amendments to preserve the effectiveness of this important intellectual property statute.
- **VHDPA is Bipartisan.** As noted above, this legislation has bipartisan co-sponsors in the Senate. NMMA urges Congress to advance this legislation in the 110th and send the bill to the President for his signature into law.

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