

LEGAL UPDATE

RECENT DEVELOPMENTS IN DIGITAL TECHNOLOGY LAW

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I. INTRODUCTION

In March 2002, the Senate Commerce Committee introduced to Congress the “Consumer Broadband and Digital Television Promotion Act” (“Broadband Act”).¹ The Broadband Act addresses fair use and copy protection concerns regarding digital consumer technologies and digital content.²

The goal of the Broadband Act is to prevent digital copyright theft and to curtail illegal redistribution of the copyrighted material.³ If passed into law, the Broadband Act would give content creators and distributors extensive control over private use of digital content.⁴ Consumer advocate groups such as the Home Recording Rights Coalition (“HRRC”) and the Electronic Frontier Foundation (“EFF”) believe that the means employed by the bill over-restrict the private consumer who uses the material legitimately.⁵ Further, critics argue that the Broadband Act will limit fair use.⁶

As a counter to the Broadband Act, Representative Zoe Lofgren (D-CA) introduced another bill in October 2002. The bill is called the “Digital Choice and Freedom Act of 2002” (“Freedom Act”).⁷ Lofgren’s Freedom Act

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¹ Consumer Broadband and Digital Television Promotion Act of 2002, S. 2048, 107th Cong. (2002).

² Home Recording Rights Coalition, *Home Recording Rights Coalition Criticizes Hollings/Stevens Bill For Inviting Undefined and Unlimited Regulation of Digital Consumer Devices*, available at <http://hrrc.org/Releases/Hollingsreleasefinal32202.doc> (last visited Nov. 22, 2002); see also Matthew Fagin, Frank Pasquale, and Kim Weatherall, *Beyond Napster: Using Antitrust Law To Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 487 (2002).

³ See S. 2048.

⁴ *Id.* at § 3, 4; see also Fagin, *supra* note 2.

⁵ See Home Recording Rights Coalition, *supra* note 2; see also Electronic Frontier Foundation, *ALERT: Congress Calls for Public Participation on Digital Media Technology Mandates*, available at http://www.eff.org/IP/SSCA_CBDTPA/20020322_eff_cbdtpa_alert.html (last visited Nov. 22, 2002).

⁶ See DigitalConsumer.org, *Help Stop the CBDTPA*, at <http://www.digitalconsumer.org/cbdtpa> (last visited Nov. 23, 2002); see also Declan McCullagh, *What Holling’s Bill Would Do*, WIRED.COM, available at <http://www.wired.com/news/politics/0,1283,51275,00.html> (Mar. 22, 2002).

⁷ Digital Choice and Freedom Act of 2002, H.R. 5522, 107th Cong. (2002).

proposes amendments to the existing Digital Millennium Copyright Act (“DMCA”) that focus on two goals: giving fair use further statutory protection, and providing standards and safeguards directed to the lawful consumer.⁸

Representatives Rick Boucher (D-VA) and John Doolittle (R-CA) have also introduced a bill similar to Lofgren's. This bill is named the “Digital Consumers' Rights Act” (“Consumers’ Act”).⁹ The Consumers’ Act, like Lofgren's bill, amends the DMCA in an attempt to restore balance between protecting the interests of copyright holders and protecting the fair use rights of consumers.¹⁰

II. CURRENT LAW

Before examining the Broadband Act, the Freedom Act and the Consumers Act in closer detail, it is helpful to first look at the current law pertaining to digital piracy.

In October 1998, Congress passed the Digital Millennium Copyright Act to implement treaties from the 1996 World Intellectual Property Organization conference in Geneva.¹¹ The most important section of the DMCA contains “anti-circumvention” piracy regulations, and is codified in Section 1201 of the Copyright Act.¹² Section 1201 contains two main prohibitions: a prohibition on acts of circumvention, and a prohibition on the distribution of tools and technologies used for circumvention.¹³ Through Section 1201, the DMCA makes circumvention of anti-piracy measures built into commercial software a criminal act.¹⁴ Further, the DMCA criminally outlaws the manufacturing, sale, or distribution of “code-cracking” devices used to copy software illegally.¹⁵ The anti-circumvention provisions aim at using criminal law to deter copyright pirates from defeating anti-piracy protections.¹⁶

Opponents of the DMCA argue that, in practice, the anti-circumvention provisions have not been used as Congress envisioned.¹⁷ Opponents contend

⁸ *Id.* at § 3.

⁹ Digital Media Consumers' Rights Act, H.R. 5544, 107th Cong. (2002).

¹⁰ See Tech Law Journal, *Reps. Boucher and Doolittle introduce Digital Media Consumer Rights Act*, available at <http://www.techlawjournal.com/topstories/2002/20021003.asp> (Oct. 3, 2002).

¹¹ Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998).

¹² See Digital Millennium Copyright Act, 17 U.S.C. §1201 (2001).

¹³ *Id.* See also Electronic Frontier Foundation, *Unintended Consequences: Three Years under the DMCA*, at http://www.eff.org/IP/DMCA/20020503_dmca_consequences.pdf (last visited Nov. 22, 2002).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Shahram A. Shayesteh, *High-Speed Chase on the Information Superhighway: The Evolution of Criminal Liability for Internet Piracy*, 33 LOY. L.A. L. REV. 183, 212 (2002).

¹⁷ Electronic Frontier Foundation, *supra* note 13.

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that the provisions have stifled an array of legitimate activities by consumers, scientists, and competitors.¹⁸ Furthermore, opponents continue to assert that the DMCA has not achieved its lofty anti-piracy goals, but instead has afforded the entertainment and software industries with an offensive measure against legitimate competitors, consumers, and scientists.¹⁹ In essence, opponents believe that the DMCA creates a serious imbalance between the rights of copyright holders and the rights of the consumer; an imbalance that greatly favors copyright holders.²⁰

III. CONSUMER BROADBAND AND DIGITAL TELEVISION PROMOTION ACT

The Broadband Act requires all new digital technology to contain security technology that regulates and controls the copying of digital content.²¹ The purpose of the bill is to enable content owners to assert limitations over the use of content (i.e., to prevent illegal use of the copyrighted good).²² The Broadband Act achieves this purpose by constraining the design of digital technology in order to make the technology incapable of promoting piracy.²³ The Broadband Act's purpose section describes this as follows:

To regulate interstate commerce in certain devices by providing for private sector development of technological protection measures to be implemented and enforced by Federal regulations to protect digital content and promote broadband as well as the transition to digital television, and for other purposes.²⁴

The Broadband Act mandates that every new digital device contain security technology meeting the standards which will be set forth pursuant to the Broadband Act.²⁵ The task of determining the substance of these standards belongs to the Federal Communications Commission ("FCC").²⁶

Before approving the standards in a formal rule, the FCC must determine whether, within one year of the enactment of the Broadband Act, representatives of digital media device manufacturers, consumer groups, and copyright owners (collectively "private sector") can reach an agreement that meets the requirements of the Broadband Act.²⁷ From this point, one of two alternative routes will occur. If the FCC determines that such an agreement

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ S. 2048, 107th Cong. § 5 (2002).

²² *Id.* at § 2, 3.

²³ *See* S. 2048.

²⁴ *Id.*

²⁵ *See id.* at § 5.

²⁶ *See id.* at § 3(a).

²⁷ *Id.*

will be reached, the FCC then must create and publish a final rule with the standards from this private sector agreement.²⁸ However, if the FCC determines that an agreement will not be reached, then a different procedure follows. The FCC must still create and publish a final rule, but in this case, the FCC itself will develop the security standards set forth by the rule.²⁹ In other words, the private sector will first get an opportunity to furnish its own agreement that conforms to the standards of the Broadband Act. If that opportunity proves fruitless, then the FCC must step in and develop the solution.

IV. HRRC CONCERNS OVER THE BROADBAND ACT

The Home Recording Rights Coalition argues that the Broadband Act imposes overly stringent restrictions on the use of content derived from digital media technology.³⁰ More specifically, the HRRC believes the Broadband Act limits the rights of consumers.³¹ The threat arises because the bill places extensive restraints on a consumer's ability to make personal copies of digital content (e.g., recording a television program for later viewing or making a backup copy of a movie).³²

On its face, the Broadband Act contains a provision allowing a consumer to make a single copy of the digital content (e.g., a television program) for personal use.³³ The HRRC contends that such a specific and stringent restriction on consumers is improper.³⁴

The HRRC has other concerns with the Broadband Act. First, the personal use provision of the Broadband Act describes the exception only in terms of copying some television programs.³⁵ The concern here is that the Broadband Act leaves unaddressed other forms of digital entertainment (e.g., computer games, music).³⁶ Second, as written, the technical restrictions can result in an absurd situation where a consumer records a program on one device in the living room but is unable to replay it on a similar device in the bedroom.³⁷ Third, the HRRC is concerned with the role and jurisdictional reach of the FCC.³⁸ The Broadband Act gives the FCC broad and poorly defined power to

²⁸ *Id.* at § 3(b).

²⁹ *Id.* at § 3(c).

³⁰ See Home Recording Rights Coalition, *supra* note 4.

³¹ See *id.*

³² See S. 2048, at §3(e)(2).

³³ *Id.*

³⁴ See Home Recording Rights Coalition, *supra* note 4.

³⁵ S. 2048. See also *id.*

³⁶ See Home Recording Rights Coalition, *supra* note 4.

³⁷ *Id.*

³⁸ *Id.*

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regulate digital media devices and content.³⁹ Fourth, the HRRRC finds many of the definitions present in the Broadband Act unclear and problematic (e.g., the definition of “digital media device”).⁴⁰ As such, the HRRRC fears that this lack of clarity will adversely affect the consumer.⁴¹

V. DIGITAL CHOICE AND FREEDOM ACT

The “Digital Choice and Freedom Act” (“Freedom Act”) strives to achieve a balance between consumer rights and copyright interests.⁴² The Freedom Act intends to protect a consumer’s ability to enjoy digital entertainment by emphasizing the importance of fair use rights.⁴³ At the same time, the Freedom Act recognizes the need to address the issue of digital piracy.⁴⁴ The Freedom Act views the solution to digital piracy differently than the Broadband Act. Whereas the Broadband Act sees the solution in an imposition of security technology, the Freedom Act asserts that the best way to curtail piracy is to give consumers a legitimate, affordable, and reliable alternative.⁴⁵

The Freedom Act proposes amendments to the DMCA that focus on consumer rights.⁴⁶ The Freedom Act would extend fair use protection to analog, as well as digital, transmissions.⁴⁷ The Freedom Act also lists specific instances where copying a digital work is permissible.⁴⁸ These instances include reproducing, storing, adapting, or accessing the work for archival purposes and for unrestricted private use.⁴⁹ The Freedom Act allows consumers to make backup copies.⁵⁰ The Freedom Act further provides that a consumer may sell or give away a copy of a digital work.⁵¹ Also, the Freedom Act prohibits shrink-wrap licenses that limit a consumer’s rights and expectations.⁵² Finally, the Freedom Act intends to give flexibility to content

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See Home Recording Rights Coalition, *supra* note 4.

⁴² News From U.S. Congresswoman Zoe Lofgren, *Lofgren Vows to Protect Consumers in the Fight Over Digital Rights Management*, at http://www.house.gov/lofgren/press/107press/021002_release.htm (Oct. 2, 2002).

⁴³ *Id.* Also H.R. 5522, 107th Cong. (2002).

⁴⁴ *Id.*

⁴⁵ See News from U.S. Congresswoman Zoe Lofgren, *supra* note 42.

⁴⁶ *Id.*

⁴⁷ See H.R. 5522, at § 3.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See H.R. 5522, at § 3; see also News from U.S. Congresswoman Zoe Lofgren, *supra* note 42.

⁵¹ *Id.*

⁵² *Id.*

owners in developing innovative means to protect content.⁵³

In another important provision, the Freedom Act allows consumers to bypass technical measures when the measures impermissibly restrict rights and expectations.⁵⁴ The Freedom Act permits circumvention of security measures in situations where the consumer intends a non-infringing use of the content and is prevented from doing so by the security technology.⁵⁵ This provision also extends to the manufacturing and distributing of anti-circumvention technology.⁵⁶

VI. DIGITAL MEDIA CONSUMERS RIGHTS ACT

In October 2002, Representative Rick Boucher introduced a pro-consumer bill similar to Representative Lofgren's.⁵⁷ This bill, called the "Digital Media Consumers' Rights Act," ("Consumers' Act") emphasizes the importance of reestablishing fair use rights in the digital context.⁵⁸ As with Lofgren's bill, the Consumers' Act would amend current copyright law in an attempt to address a perceived imbalance in favor of copyright holders.⁵⁹ The Consumers' Act remedies this imbalance by giving additional statutory recognition to a consumer's fair use rights.

Much as with the Freedom Act, the Consumers' Act would amend Section 1201 of the DMCA.⁶⁰ The Consumers' Act would also amend the Federal Trade Commission Act.⁶¹ The Consumers' Act contains two main changes. First, it requires music discs to contain labels with information regarding circumvention technology.⁶² A violation of this labeling would constitute an unfair or deceptive trade practice within the meaning of the Federal Trade Commission Act.⁶³ Second, it limits the anti-circumvention provisions of the DMCA.⁶⁴ The Consumers' Act sets forth specific exceptions to the anti-circumvention provision, including a scientific research exception and a broader fair use exception that is analogous to the circumvention exception in the Freedom Act.⁶⁵ This fair use exception permits a consumer to circumvent

⁵³ *Id.*

⁵⁴ *See id.* at § 5; *see also* News from U.S. Congresswoman Zoe Lofgren, *supra* note 42.

⁵⁵ *See id.* at § 5.

⁵⁶ *See id.*

⁵⁷ Digital Media Consumers' Rights Act, H.R. 5544, 107th Congress (2002).

⁵⁸ *See* DMRCA Handout, *Digital Media Consumers' Rights Act*, available at <http://www.house.gov/boucher/docs/dmcrhandout.htm> (last visited Nov. 22, 2002).

⁵⁹ *See id.*

⁶⁰ *See* H.R. 5544.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See* DMRCA Handout, *supra* note 58.

⁶⁵ H.R. 5544. *Also* H.R. 5522, 107th Congress (2002).

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security technology when circumvention does not infringe on the copyright holder's rights.⁶⁶

An interesting aspect of the Consumers' Act is that Representative Boucher presented the bill to the House Commerce Committee, and not the House Judiciary Committee.⁶⁷ While the Judiciary Committee typically hears intellectual property issues, Boucher may believe that there is a strategic advantage placing the Consumers' Act firmly within the jurisdiction of the Commerce Committee.⁶⁸ This strategy is founded on a perception that the Commerce Committee receives pro-consumer bills more favorably.⁶⁹

VII. CONCLUSION

Congress did not vote on the bills described in this update during the 107th Congress. In the meantime, the DMCA will continue to govern digital media. The presence of these bills, however, leads one to believe that the DMCA's days are numbered.

While there appears to be a general consensus that the DMCA needs to be replaced or amended, there is a wide disparity over the regulations that should take its place. With the ongoing development of digital technology, the imminent digital television transition, and the continued debate among consumer groups, the entertainment industry, and the technology industry, resolving the digital piracy issue is an important goal for the next Congress.

⁶⁶ H.R. 5544.

⁶⁷ See Tech Law Journal, *supra* note 10.

⁶⁸ *Id.*

⁶⁹ See *id.*