LEGAL UPDATE

RECENT DEVELOPMENTS IN DIGITAL TECHNOLOGY LAW

Philip D. Garrow*

I. INTRODUCTION

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

The goal of the Broadband Act is to prevent digital copyright theft and to curtail illegal redistribution of the copyrighted material. If passed into law, the Broadband Act would give content creators and distributors extensive control over private use of digital content. 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. Further, critics argue that the Broadband Act will limit fair use.

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”).

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* J.D. candidate, Boston University School of Law, 2003; B.A. summa cum laude, University of Pittsburgh, 1999.


3 See S. 2048.

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


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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

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8 Id. at § 3.
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.
17 Electronic Frontier Foundation, supra note 13.
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.
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. 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. 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. More specifically, the HRRC believes the Broadband Act limits the rights of consumers. 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).

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. The HRRC contends that such a specific and stringent restriction on consumers is improper.

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. The concern here is that the Broadband Act leaves unaddressed other forms of digital entertainment (e.g., computer games, music). 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. Third, the HRRC is concerned with the role and jurisdictional reach of the FCC. The Broadband Act gives the FCC broad and poorly defined power to

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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.
regulate digital media devices and content.\(^3^9\) Fourth, the HRRC finds many of the definitions present in the Broadband Act unclear and problematic (e.g., the definition of “digital media device”).\(^4^0\) As such, the HRRC fears that this lack of clarity will adversely affect the consumer.\(^4^1\)

### 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.\(^4^2\) The Freedom Act intends to protect a consumer’s ability to enjoy digital entertainment by emphasizing the importance of fair use rights.\(^4^3\) At the same time, the Freedom Act recognizes the need to address the issue of digital piracy.\(^4^4\) 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.\(^4^5\)

The Freedom Act proposes amendments to the DMCA that focus on consumer rights.\(^4^6\) The Freedom Act would extend fair use protection to analog, as well as digital, transmissions.\(^4^7\) The Freedom Act also lists specific instances where copying a digital work is permissible.\(^4^8\) These instances include reproducing, storing, adapting, or accessing the work for archival purposes and for unrestricted private use.\(^4^9\) The Freedom Act allows consumers to make backup copies.\(^5^0\) The Freedom Act further provides that a consumer may sell or give away a copy of a digital work.\(^5^1\) Also, the Freedom Act prohibits shrink-wrap licenses that limit a consumer’s rights and expectations.\(^5^2\) Finally, the Freedom Act intends to give flexibility to content

\(^3^9\) Id.
\(^4^0\) Id.
\(^4^1\) See Home Recording Rights Coalition, supra note 4.
\(^4^3\) Id. Also H.R. 5522, 107th Cong. (2002).
\(^4^4\) Id.
\(^4^5\) See News from U.S. Congresswoman Zoe Lofgren, supra note 42.
\(^4^6\) Id.
\(^4^7\) See H.R. 5522, at § 3.
\(^4^8\) Id.
\(^4^9\) Id.
\(^5^0\) See H.R. 5522, at § 3; see also News from U.S. Congresswoman Zoe Lofgren, supra note 42.
\(^5^1\) Id.
\(^5^2\) Id.
owners in developing innovative means to protect content.\footnote{Id.}

In another important provision, the Freedom Act allows consumers to bypass technical measures when the measures impermissibly restrict rights and expectations.\footnote{See id. at § 5; see also News from U.S. Congresswoman Zoe Lofgren, supra note 42.} 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.\footnote{See id. at § 5.} This provision also extends to the manufacturing and distributing of anti-circumvention technology.\footnote{See id.}

VI. DIGITAL MEDIA CONSUMERS RIGHTS ACT

In October 2002, Representative Rick Boucher introduced a pro-consumer bill similar to Representative Lofgren’s.\footnote{Digital Media Consumers’ Rights Act, H.R. 5544, 107th Congress (2002).} This bill, called the “Digital Media Consumers' Rights Act,” (“Consumers’ Act”) emphasizes the importance of reestablishing fair use rights in the digital context.\footnote{See DMRCA Handout, Digital Media Consumers’ Rights Act, available at http://www.house.gov/boucher/docs/dmcrahandout.htm (last visited Nov. 22, 2002).} 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.\footnote{See id.} 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.\footnote{See H.R. 5544.} The Consumers’ Act would also amend the Federal Trade Commission Act.\footnote{Id.} The Consumers’ Act contains two main changes. First, it requires music discs to contain labels with information regarding circumvention technology.\footnote{Id.} A violation of this labeling would constitute an unfair or deceptive trade practice within the meaning of the Federal Trade Commission Act.\footnote{Id.} Second, it limits the anti-circumvention provisions of the DMCA.\footnote{See DMRCA Handout, supra note 58.} 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.\footnote{H.R. 5544. Also H.R. 5522, 107th Congress (2002).} This fair use exception permits a consumer to circumvent
security technology when circumvention does not infringe on the copyright holder's rights.\textsuperscript{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.\textsuperscript{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.\textsuperscript{68} This strategy is founded on a perception that the Commerce Committee receives pro-consumer bills more favorably.\textsuperscript{69}

\section*{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.

\textsuperscript{66} H.R. 5544.
\textsuperscript{67} See Tech Law Journal, supra note 10.
\textsuperscript{68} Id.
\textsuperscript{69} See id.